Supreme Court, U.S.
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No. 01-

IN THE

Supreme Court of the United States

CITY OF COLUMBUS, *et al.*,

Petitioners,

v.

OURS GARAGE AND WRECKER SERVICE, INC., *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does 49 U.S.C. § 14501(c) of the Interstate Commerce Act permit cities to enact safety regulations regarding local tow-truck operations, as the Second Circuit and the California Court of Appeals have held, or does it preempt such regulations, as the Fifth, Sixth, Ninth and Eleventh Circuits have held?

PARTIES TO THE PROCEEDINGS

Petitioners are (1) the City of Columbus, (2) the Director of Public Safety for the City, Mitchell Brown, and (3) the License Supervisor of the Public Safety Department for the City, Bobbie Beavers. Respondents are (1) Ours Garage and Wrecker Service, Inc., and (2) the Towing and Recovery Association of Ohio.

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The opinion of the court of appeals (Pet. App. 1-A) is reported at 257 F.3d 506 (6th Cir. 2001), and the district court's opinion (Pet. App. 33-A) is unreported.

JURISDICTION

The court of appeals entered judgment on June 19, 2001. Pet. App. 3-A. Jurisdiction in this Court exists under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

49 U.S.C. § 14501(c)(1) and (2) of the Interstate Commerce Act ("ICA") provide:

> (1) General rule.—Except as provided in paragraphs (2) and (3), a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier (other than a carrier affiliated with a direct air carrier covered by section 41713(b)(4)) or any motor private carrier, broker, or freight forwarder with respect to the transportation of property.
>
> (2) Matters not covered.—Paragraph (1)—
>
> > (A) shall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization;

(B) does not apply to the transportation of household goods; and

(C) does not apply to the authority of a State or a political subdivision of a State to enact or enforce a law, regulation, or other provision relating to the price of for-hire motor vehicle transportation by a tow truck, if such transportation is performed without the prior consent or authorization of the owner or operator of the motor vehicle.

STATEMENT

This case squarely presents a recurring federal question that has not been, but should be, resolved by the Court. Over the last several years, five circuit courts, numerous state courts, and several other lower courts have struggled to answer an interpretive question of essential importance to one city after another in the country—namely, whether municipalities may promulgate public-safety regulations regarding the use of tow trucks within their city limits. Enacted in virtually every major city in the country, the regulations typically require local tow-truck operators to obtain a license and to follow modest safety practices when picking up wrecks within the city. Among other things, the regulations are "aimed at eliminating the practice of 'chasing'—where tow trucks race one another to an accident scene in competition for business." *Ace Auto Body & Towing, Ltd. v. City of New York*, 171 F.3d 765, 768 (2d Cir. 1999).

As acknowledged by several lower courts, including the Sixth Circuit, this question has divided the courts of appeals. And in view of the large number of cities that have adopted equivalent regulations, there can be little doubt about the importance of this federal question to local governments, to say nothing of the acute public-safety issues implicated by

resolution of the issue. For these reasons and those added below, the petition should be granted.

1. Like many other cities in the United States, the City of Columbus has enacted public-safety ordinances designed to protect its residents from the perils of unsafe towing practices. Starting in 1972, the city began addressing the issue of local tow-truck practices by requiring each operator to obtain a license from the city to engage in the towing business. At the same time, it established minimum requirements with regard to liability insurance, truck identification and record keeping with respect to the vehicles that each operator towed. *See* Columbus City Code §§ 549.92, 549.14, 549.15, 549.16, 549.17 and 549.18. Pet. App. 36-A. In accordance with regulations promulgated by the Columbus Director of Public Safety, each licensed tow truck also must undergo a safety inspection on an annual basis. The inspection ensures that the tow trucks are equipped with essential safety items such as flares, fire extinguishers, shovels and brooms, and that the truck itself meets certain minimum requirements for size, towing capacity and lift equipment. *See* City of Columbus Wrecker Rules and Regulation, App. 48-A, and Wrecker Inspection Sheet (enumerating items to be inspected), Pet. App. 54-A. These licensing and other requirements, it bears noting, apply only to tow-truck operators who contract to pick up wrecks within the City of Columbus. *See* Columbus City Code 549.02 ("This section shall not apply . . . when the property being towed has been picked up outside of the City").

2. In addition to these basic regulations, Columbus provides that towing operators may not respond to the scene of an accident unless "summoned by a person having a direct interest in the vehicle . . . or dispatched thereto as provided in the rules and regulations promulgated by the [City] Safety

Director." Columbus City Code § 549.065, Pet. App. 40-A. This provision, like those in many other cities, is designed to root out "chasing," an increasingly prevalent practice by which tow-truck operators race one another to the scene of an accident in the hopes of elbowing out competitors for the business. *See Stucky v. City of San Antonio*, No. 00-50462, — F.3d —, 2001 WL 863500, at *1 (5th Cir. July 30, 2001) (ordinance designed to eliminate "the acknowledged practice of tow truck operators monitoring police radios for reports of accidents and then racing to the scene of those accidents . . . [which] interfered with accident investigations and the provision of emergency care required at the scene").

3. The Columbus tow-truck experience parallels that of other cities in an additional respect. Like many other municipalities, Columbus is located in a State that delegates broad authority to its cities to pass police-power regulations in general and to regulate local transportation issues (like towing) in particular. Section 3 of Article XVIII of the Ohio Constitution grants municipalities general authority "to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with the general laws." The Ohio General Assembly also has enacted several statutes that expressly empower municipalities to regulate motor vehicles and the transportation of articles upon its highways. For example, Ohio R.C. § 715.22 provides that a municipality may regulate the use of vehicles and may regulate the transportation of articles upon its highways. And Ohio R.C. § 723.01 provides that "municipal corporations shall have special power to regulate the use of the streets." Ohio likewise has specifically exempted tow trucks from the State's regulation of motor carriers, Ohio R.C. §§ 4921.02(A)(8) and 4923.02(A)(10), thus leaving it to municipalities and other local governmental entities to regulate local tow-truck

operations. *See Cincinnati v. Reed*, 27 Ohio App. 3d 115, 120, 500 N.E.2d 333, 339 (1st Dist. Ct. App. 1985) (finding municipal towing regulations authorized by state law).

4. Ours Garage and Wrecker Service, Inc. operates a towing company that provides services in Columbus, Ohio. In September of 1998, its Columbus tow-truck license expired, and the company failed to renew the license. Shortly thereafter, one of the company's drivers was cited for failing to have a towing license.

Rather than renew its license at that point in time, the company filed this declaratory judgment action against the City of Columbus and two city officials in the United States District Court for the Southern District of Ohio on December 3, 1998. The lawsuit received support from the Towing and Recovery Association of Ohio, a trade association of tow truck operators, which became a co-plaintiff in the case. In their complaint, the two claimants alleged that 49 U.S.C. § 14501(c)(1) preempts Columbus City Code Chapter 549 and therefore prohibits the city from regulating local towing operations. The City of Columbus responded that while the general preemption provision preempts state laws and regulations "related to price, route or service of any motor carrier . . . with respect to the transportation of property," that provision is expressly subject to several exceptions, including § 14501(c)(2)(A), which permits "the safety regulatory authority of a State" to address towing issues like those presented here.

The district court, however, disagreed. On March 10, 2000, it granted summary judgment for plaintiffs, finding Columbus' towing ordinance preempted and enjoining the City from continuing to enforce it. In doing so, the court said that the regulations were preempted "for the reasons set forth in a decision issued in a virtually identical" case, citing *R. Mayer of*

Atlanta, Inc. v. City of Atlanta, 158 F.3d 538 (11th Cir. 1998), and specifically "decline[d] to follow *Ace Auto Body & Towing v. City of New York*, 171 F.3d 765 (2d Cir.)," which had upheld a similar New York City towing ordinance. *See* Pet. App. 34-A.

5. On June 19, 2001, the court of appeals affirmed in a two-paragraph opinion. Relying on *Petrey v. City of Toledo*, 246 F.3d 548 (6th Cir. 2001), the court held that the ICA preempts all local towing regulations of this sort. Pet. App. 2-A. In *Petrey*, the court of appeals invalidated a similar ordinance promulgated by the City of Toledo, and Columbus conceded that it controlled the outcome of this action. The *Petrey* decision, like the district court opinion here, acknowledged that "[t]here is currently a conflict among the circuits" as to whether § 14501(c)(2)(A) exempts tow-truck "safety regulations by political subdivisions." 246 F.3d at 560; Pet. App. 23-A.

REASONS FOR GRANTING THE WRIT

As the Statement suggests and as the case reporters confirm, the question presented is not new. Five circuit courts have issued thoughtful decisions on the issue, four siding with respondents, one siding with the City of Columbus. And the California Court of Appeals has issued a decision that supports Columbus, but conflicts with the Ninth Circuit on the point at hand and with respect to an overlapping jurisdiction of the country. The sheer number of municipalities that have promulgated regulations like the Columbus ordinance, together with the commendable public-safety objectives of the provisions, confirms the importance of this federal question. And the fact that the Sixth Circuit cast its lot with the incorrect side of this lower-court division also supports the writ. All things considered, the case presents an eminently-suitable vehicle for resolving an issue that the Sixth Circuit

acknowledged has created a "conflict among the circuits," *Petrey*, 246 F.3d at 560, that the Fifth Circuit acknowledged raises a "difficult task of statutory interpretation," *Stucky v. City of San Antonio*, 2001 WL 863500, at * 15, and that affects every major city in the country. The writ should be granted.

I. The Question Presented Has Divided The Lower Courts.

A. The Fifth, Sixth, Ninth and Eleventh Circuits Have Held That The Safety Exemption Does Not Apply To Local Tow-Truck Regulations.

On one side of the ledger, four circuit courts have concluded that the ICA preempts safety regulations like this one. The Sixth Circuit's recent *Petrey* decision typifies this school of thought.

At issue in *Petrey* were two types of licenses that the City of Toledo had made available to tow truck operators. One, the "Class B" license, permitted a tower to conduct private and third-party tows, while the other, the "Class A" license, allowed the holder to conduct non-consensual tows ordered by the Toledo Police Department. The court first ruled that the municipal-proprietor exception, *see Building & Constr. Trades Council v. Associated Builders & Contractors of Massachusetts/Rhode Island, Inc.*, 507 U.S. 218, 226-27 (1993), justified the Class A license. *Petrey*, 246 F.3d at 555-59. As the court explained, "these provisions do nothing more than serve the City's narrow proprietary interest in working with those towing companies who will be most able to meet safely and efficiently the Toledo Police Department's towing needs." *Id.* at 559.

The Class B license, however, was a different matter. Here, the court focused on the fact that the general preemption

provision applies to "a State, political subdivision of a State, or political authority of 2 or more States," while the safety exemption applies just to "the safety regulatory authority of a State." 49 U.S.C. 14501(c)(1) & (2). Relying on *Russello v. United States*, 646 U.S. 16, 23 (1983) ("[w]here Congress includes particular language in one section of a statue but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion"), the court concluded that the omission of a reference to cities in the safety exemption (section 14501(c)(2)(A)) meant that "while states may regulate the safety of motor carriers, political subdivisions may not," *Petrey*, 246 F.3d at 561.

Petrey found further support for this interpretation in its reading of the legislative history.

> "[T]he conferees believe preemption legislation is in the public interest as well as necessary to facilitate interstate commerce. State economic regulation of motor carrier operations causes significant inefficiencies, increased costs, reduction of competition, inhibition of innovation and technology and curtails the expansion of markets. . . . The sheer diversity of these regulatory schemes is a huge problem for national and regional carriers attempting to conduct a standard way of doing business."

246 F.3d at 563 (quoting H.R. CONF. REP. NO. 103-677, at 87 (1994), *reprinted* in 1994 U.S.C.C.A.N. 1715, 1759). To *Petrey*, this report indicated that "one of the means by which Congress intended to encourage market forces was through the elimination of a myriad of complicated and potentially conflicting state regulations, thus indicating that yet another level of regulation at the local level would be disfavored." *Id.*

The Ninth and Eleventh Circuits have followed a similar path. In *R. Mayer of Atlanta, Inc. v. City of Atlanta*, 153 F.3d 538 (11th Cir. 1998), *cert. denied*, 528 U.S. 1038 (1999), tow truck companies objected to several ordinances adopted by Atlanta dealing with "consensual tows"—that is, tows "which occur when the owner of a vehicle expressly requests towing services to be provided by a specific towing company and enters a private contract with the towing company for the services." *Mayer*, 153 F.3d at 541. After finding that the general preemption provision, § 14501(c)(1), applied to the contested tow truck ordinances, *id.* at 545, the court considered whether the safety exemption saved them from preemption. Like the Sixth Circuit, it applied "the presumption that, when Congress omits certain language in a particular subsection of a statute and includes the language in other subsections, the omission is intentional rather than accidental." 153 F.3d at 545-46. Because only "a State" appears in § 14501(c)(2)(A), and not "a State or a political subdivision of a State" as in § 14501(c)(2)(C), the court concluded that this illustrated "Congress' intent that municipal safety and insurance regulations are not exempted from the preemptive scope of § 14501(c)(1)." *Mayer*, 153 F.3d at 545-46. The court also found that "this interpretation" was "consistent with the policy objectives underlying the ICCTA." *Id.* at 546 (citing H.R. CONF. REP. NO. 103-677, at 87 (1994), *reprinted* in 1994 U.S.C.C.A.N. 1715, 1759).

Tocher v. City of Santa Ana, 219 F.3d 1040 (9th Cir. 2000), *cert. denied*, 121 S.Ct. 1085 (2001), too, concluded that a city ordinance, which required permits to operate a tow truck in the city, was preempted by § 14501(c)(1). Here again the court relied on the safety exemption's (but not the preemption provision's) sole reference to "the safety regulatory authority of a State," as well as on its view that "a strict

reading furthers the policy of deregulation underlying the enactment of section 14501." *Id.* at 1051.

Just one month ago, the Fifth Circuit added its views to this debate. Also at issue in *Stucky v. City of San Antonio*, No. 00-50462, — F.3d —, 2001 WL 863500 (5th Cir. July 30, 2001), were licensing ordinances that among other things were designed to end the practice of tow truck operators who "rac[ed] to the scene" of accidents after hearing about them on police-radio frequencies. *Stucky*, 2001 WL 863500, at *1. In addressing whether the ICA preempted the regulations, the court acknowledged "the closeness of the issue and the soundness of the arguments on either side." *id.* at *12, as well as the different positions taken by other lower courts on this "difficult task of statutory interpretation," *id.* at *15. Ultimately, however, the Fifth Circuit embraced the reasoning of the Sixth, Ninth and Eleventh Circuits in concluding that the absence of a reference to political subdivisions in section 14501(c)(2)(A) showed that the safety exemption did not apply to local ordinances.

B. The Second Circuit And Several State Courts Have Upheld Similar Regulations.

On the other side of the ledger, the Second Circuit and several state courts have upheld safety regulations like the one at issue here. In *Ace Auto Body & Towing, Ltd. v. City of New York*, 71 F.3d 765 (2d Cir.), *cert. denied*, 528 U.S. 868 (1999), the court acknowledged that political subdivisions were not specifically mentioned in the safety exemption. But it reasoned that even though "the text of § 14501(c)(2)(A), unlike the other subsections of § 14501, fails to preserve explicitly the regulatory authority of the political subdivision of the state," that is "no reason to construe" the language of § 14501(c)(2)(A) "to prevent the state from delegating *its*

regulatory authority to a municipality." *Ace Auto*, 171 F.3d at 775.

In doing so, *Ace Auto* sought guidance from this Court's previous effort to address a similar issue raised by the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"). That statute, the Second Circuit noted, expressly permits only "States" to regulate pesticides, but this Court still held that the most "plausible reading of FIFRA's authorization to the States leaves the *allocation* of regulatory authority to the 'absolute discretion' of the States themselves, including the option of leaving local regulation of pesticides in the hands of local authorities." *Ace Auto*, 171 F.3d at 775-776 (emphasis added) (quoting *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 608 (1991)). As more fully explained in *Mortier*:

> The principle is well settled that local "'governmental units are "created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them" . . . in [its] absolute discretion.'" . . . The exclusion of political subdivisions cannot be inferred from the express authorization to the "State[s]" *because political subdivisions are components of the very entity the statute empowers*.

501 U.S. at 607-08 (emphasis added) (quotations omitted). Just as *Mortier* concluded that FIFRA permitted States to delegate authority to political subdivisions even though they were not explicitly mentioned in the statute, so the Second Circuit reasoned it was appropriate to read the ICA to permit such a delegation here. *Ace Auto*, 171 F.3d at 775-76 (citing *Mortier*, 501 U.S. at 607-09).

The Second Circuit also read the legislative history differently from the other courts of appeals. In its view, there is "no reason to construe this language to prevent the State

from delegating its regulatory authority to a municipality. To the contrary, the legislative history indicates that state safety regulatory authority (including, presumably, the authority to delegate) was to be 'unaffected' by the preemption statute." *Ace Auto*, 171 F.3d at 775 (quoting H.R. CONF. REP. NO. 103-677, at 84-85, reprinted in 1994 U.S.C.C.A.N. at 1756, 1757). Accordingly:

> [A]lthough the legislative history clearly illustrates Congress' deregulatory purpose, the history is ambiguous as to the scope of that purpose. More particularly, the reports issued in connection with § 14501 suggest that its primary purpose was to eliminate local economic regulation, not local safety regulation. To the extent that the scope of Congress' purpose is unclear, we hesitate to construe the text of § 14501 so as to frustrate unnecessarily the ability of municipalities to respond to the local safety concerns created by local towing industries.

Ace Auto, 171 F.3d at 775 (citing H.R. CONF. REP. NO. 103-677, at 86-87 (1994), reprinted in 1994 U.S.C.C.A.N. at 1758-59) (internal citation omitted).

Like the Second Circuit, the California Court of Appeals has held that towing ordinances of this type are not preempted by the ICA. "Because safety regulations fall within the traditional police powers of the states, and because Congress has expressly excepted safety regulations from the preemption clause, we cannot curtail the ability of local municipalities to respond to local safety concerns without a clear expression that such was the intent of Congress." *People ex rel. Renne v. Servantes*, 103 Cal. Rptr. 2d 870, 879-80 (Cal. Ct. App.), *review denied* (May 16, 2001). Notably, the California Supreme Court denied discretionary review of *Servantes*, and in view of the Ninth Circuit's decision in *Tocher* no reasonable prospect exists that the State's highest court *ever* will look at

the issue. The Michigan Court of Appeals reached a similar result in *Michigan Trucking Ass'n v. Michigan Public Service Comm'n*, 571 N.W.2d 734 (Mich. App. 1997), *appeal denied*, 583 N.W.2d 900 (Mich. 1998). There, the issue was not whether a State could delegate its safety authority to a city but rather whether it could do so to a state agency — more specifically, whether the State could delegate authority to the Michigan Public Service Commission to develop and implement a "motor carrier safety rating system." *Id.* at 735. The appellate court expressly held that the agency's safety regulations were not preempted because the rules were "promulgated by the PSC pursuant to its authority from the Legislature" and thus fell within the ICA's safety exemption. *Id.* at 737.

In the final analysis, the division of lower-court authority is mature and deep. Four circuit courts have concluded that the ICA preempts towing regulations like the Columbus ordinance. And one circuit court and two state courts have concluded that these and similar safety ordinances may remain in effect. In the wake of these holdings, the only feature of a local towing ordinance that would affect its validity turns on the jurisdiction in which it was passed, not on what the ordinance said. Add to this the fact that the Sixth and Ninth Circuits on the one hand and the California and Michigan state courts on the other have reached different conclusions about the same issue and with respect to the same jurisdiction, and it becomes clear that this division authority by itself justifies the writ.

II. The Question Presented Is Recurring In Nature And Significant To Municipalities Throughout The Country.

Besides raising a question that implicates a developed split in authority, the petition addresses a matter of ongoing and essential importance to cities throughout the country. As an initial matter, the sheer number of cases on the issue confirms the proliferation of local ordinances that municipalities in every region of the country have promulgated in order to address tow-truck safety in general and accident "chasing" in particular. In addition to *Ace Auto*, *Stucky*, *Petry*, *Tocher*, *Mayer*, *Servantes*, and *Michigan Trucking Association*, these cases include the following: *Northway Towing, Inc. v. City of Pasadena, Tex.*, 94 F. Supp. 2d 801 (S.D. Tex. 2000); *Hott v. City of San Jose*, 92 F. Supp. 2d 996 (N.D. Cal. 2000); *Cedar Bluff 24-Hour Towing, Inc. v. City of Knoxville*, 78 F. Supp. 2d 725 (E.D.Tenn. 1999); *A.J.'s Wrecker Service, Inc. v. City of Dallas*, Nos. 97-1311D, 97-2398D, 1998 WL 185521 (N.D. Tex. April 15, 1998); *Harris County Wrecker Owners for Equal Opportunity v. City of Houston*, 943 F.Supp. 711 (S.D. Tex. 1996); *Whitten v. Vehicle Removal Corp.*, No. 05-00-00531-CV, 2001 WL 898535 (Tex. App. Aug. 10, 2001); *Horn v. A.J.'s Wrecker Service, Inc.*, No. 05-99-01402-CV, 2000 WL 1184597 (Tex. App. Aug 22, 2000).

Aside from the ordinances involved in these cases, countless other cities and counties have promulgated similar regulations. *See, e.g.*, CINCINNATI MUNICIPAL CODE § 869-7; LOS ANGELES COUNTY, CAL., CODE § 7.28.020; SACRAMENTO, CAL., CODE §§ 5.144.010–5.144.090; SAN FRANCISCO, CAL., POLICE CODE §§ 3000-3013; CHICAGO, ILL., MUN. CODE §§ 9-44-010–9-44-060; ST. LOUIS COUNTY, MO., REVENUE ORD. §§ 813.070–813.080; MYRTLE BEACH CITY

CODE § 23-133; PORTLAND, OR., CODE § 14.36.040; PHILADELPHIA, PA., CITY CODE § 9-605; SEATTLE, WASH., MUN. CODE §§ 6.214.040–6.214.070. The number of cases on the issue, together with the conspicuous number of ordinances that have been passed on this topic, confirm that this public-safety issue should be resolved sooner rather than later.

In addition to the customary requests for uniformity that a deep conflict in the lower courts prompts, the issue here has led to uncertainty even for residents of the same State. The Ninth Circuit and the California state courts for example have charted different paths in answering this specific question. The same is true of the Sixth Circuit and the Michigan state courts. Because no one litigant and the residents of no one State should have to face such unpredictable consequences stemming from the same governmental conduct, this factor alone supports the writ.

Nor is the authority of States to delegate responsibility over this issue inconsequential. All States to our knowledge delegate considerable police-power authority to cities, counties, and municipal associations, including responsibility over public-safety issues on local streets and roads. Yet the consequence of the Sixth Circuit's decision is to force Ohio to enact any such regulations at the state level rather than allowing localities to pass laws tailored to the unique conditions of their city streets. As a matter of Federal-State comity and as this Court's decision in *Mortier* attests, federal courts should not lightly infer a national desire to upset this traditional allocation of State power. The significance of this issue plus the numerous ordinances premised on this traditional understanding of State authority independently support the writ.

III. The Sixth Circuit Erred In Concluding That The City of Columbus Could Not Regulate This Activity.

In holding that the City of Columbus may not regulate private towing activities in the same way that the City of New York may, the Sixth Circuit also erred. This, too, justifies review.

In 1994, Congress enacted the following provisions:

> (1) General rule.—Except as provided in paragraphs (2) and (3), a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier . . . or any motor private carrier, broker, or freight forwarder with respect to the transportation of property.
>
> (2) Matters not covered.—Paragraph (1)—
>
> > (A) shall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization;

49 U.S.C. § 14501(c)(1) & (2).

In concluding that States but not cities may enact towing safety regulations, the Sixth Circuit (like several of its sister circuits) principally focused on the textual distinction between the governmental bodies mentioned in the one but not the other provision. In its view the contrast between the specific

mention of "political subdivision[s]" in subsection (c)(1) and its absence in subsection (c)(2)(A) could only be given content by reading the exemption as applying solely to "State"-enacted safety regulations. *Petrey*, 246 F.3d at 561; *see id.* ("[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion") (quoting *Russello v. United States*, 646 U.S. 16, 23 (1983)).

Columbus of course does not quarrel with the *Russello* principle, and appreciates the surface appeal of the Sixth Circuit's application of it here. But in the end, the court of appeals was only half correct in applying this interpretive rule and fully wrong in denying Columbus authority to pass this sensible regulation.

First, in focusing on the different references to political bodies in the two subsections, the court slighted other more illuminating distinctions between the provisions. The preemption provision says that "a State, political subdivision of a State, or political authority of 2 or more States may not *enact or enforce* a law, regulation, or other provision" relating to a price, route or service of any motor carrier. 49 U.S.C. 14501(c)(1) (emphasis added). The scope of preemption is broad, to be sure. But so is the safety exemption that directly follows it. Instead of referring to the authority to "enact or enforce" safety regulations, it expansively says that the preemptive force of the ICA "shall not restrict the *safety regulatory authority of a State* with respect to motor vehicles." 49 U.S.C. 14501(c)(2)(A) (emphasis added).

Far from signaling that cities could never pass such safety ordinances, the language of the safety exemption signifies something else. The "safety regulatory authority of a State," it turns out, is a term of art that encompasses an entity's own

authority to regulate, as well as its authority to delegate regulatory power to a lesser governmental body (say to a "political subdivision of a State") or to aggregate its regulatory power with another political body of equal stature (say with "2 or more States"). Congress thus left "political subdivision[s]" (as well as the power of "2 or more States") out of subsection 14501(c)(2)(A) not because it meant to deny them authority but because it was more appropriate, as a matter of Federal-State comity, to allow each State to make that decision for itself.

Nor is it inconsistent to enumerate the political entities that are preempted from enacting a certain law, then to vest regulatory authority in each State to decide which political entities (cities, counties, or other political authorities) may benefit from an exemption to the rule. It will often be the case that a general ban enumerates those covered by it, while delegating to another authority the power to establish and implement exceptions to the ban. For example, the Secretary of the Army may enact a general rule banning all on-duty card playing by generals, lieutenants, captains and other members of the armed services. But the Secretary does not undercut that rule by empowering generals to decide what is "off duty" and what it not or even to delegate that decision to others. As every soldier knows (and as every law firm associate learns), allocations of power in a hierarchical system are not necessarily symmetric.

Second, this reading not only makes sense out of the different references to political bodies in the two provisions, but it also respects another indicator of statutory meaning—Congress' prior understanding of the term "State regulatory authority." Keep in mind that the 1994 passage of this law came just three years after *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597 (1991). That decision

concerned a federal law providing that a "State *may regulate* the sale or use of any federally registered pesticide." *Id.* at 606 (emphasis added). In construing the statute, the Court concluded that the law's express grant of "*regulatory authority to the States*" did not deprive municipalities of regulatory authority but meant only that "localities could not claim the regulatory authority explicitly conferred upon the States that might otherwise have been preempted through actual conflicts with federal law." *Id.* at 607 (emphasis added). The Court explained that the most plausible reading of a grant of regulatory authority to the State is that it "leaves the allocation of regulatory authority to the 'absolute discretion' of States themselves, *including the option of leaving local regulation of pesticides in the hands of local authorities.*" *Id.* at 608 (emphasis added). Against this backdrop, Congress's reference to "the safety regulatory of a State" in the ICA is most sensibly read to include the power to delegate its authority to local government entities. *See St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 541 (1978) (where "Congress . . . employed terminology that evokes a tradition of meaning, . . . [i]t may be assumed, in the absence of indications to the contrary, that Congress intended this language to be read in light of that tradition").

Both before *Mortier* and after it, other parts of the United States Code have reflected this understanding. When Congress refers to a "regulatory authority," it thus means to include the State agency or political subdivision delegated State power, not just the State itself. *See, e.g.*, 12 U.S.C. § 1813(c)(1) (Banking); 30 U.S.C. § 1291(22) (Mining); 42 U.S.C. § 8302(a)(21) (Power plant usage); 49 U.S.C. § 60117(i) (Pipelines). Indeed, after the 1994 passage of the ICA provisions at issue in this case, Congress used similar terminology in the Telecommunications Act of 1996. Like the ICA, the preemption provision of that Act says that "No State

or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." 47 U.S.C. § 253(a). And like the ICA, the exemption provision of the Act, entitled "*State regulatory authority*," preserves the authority "of a *State* to impose . . . requirements necessary to preserve and advance universal service, protect the public safety and welfare." 47 U.S.C. § 253(b) (emphasis added). Several courts have made clear that the passage of the law against the backdrop of *Mortier* indicates that States may delegate their retained authority to local political bodies. *See, e.g., Cablevision of Boston, Inc. v. Public Improvement Comm'n of the City of Boston*, 184 F.3d 88, 98 (1st Cir. 1999); *AT&T Communications of the Southwest, Inc. v. City of Dallas*, 8 F. Supp. 582, 591 (N.D. Tex. 1998). Not surprisingly, the FCC itself has also embraced this interpretation. *In re Classic Tel.*, 11 F.C.C.R. 13082, ¶ 34 (1996).

Third, this interpretation of the ICA is the only one that makes sense. Subsection 14501(c)(1), recall, specifies that State political subdivisions may not "enact or *enforce*" any towing laws. (Emphasis added.) As a result, if subsection 14501(c)(2)(A) were construed to reinstate only the *State*'s authority to enact and enforce safety laws (and to preempt any delegation of that authority), state safety laws could never be enforced by cities. That would mean only state troopers, and not city police officers for example, could make arrests or issue fines for a violation of state towing laws. This would come as a great surprise to the States, as most law-enforcement authority (including authority to enforce state laws) is exercised by county and city police officials. In the end, this interpretation would lead to the practical unenforceability of the very safety regulations that the ICA meant to exempt from federal preemption.

The Sixth Circuit's interpretation yields another anomaly. If the specific reference to a "political subdivision of a State" subsection (c)(1) means that such bodies cannot pass towing safety regulations under subsection (c)(2)(A), then it also must mean that the reference to the "political authority of 2 or more States" in the preemption provision (and its absence in the exemption) means that States cannot aggregate their power to create a regional safety rule for their streets and byways. That interpretation cannot be squared with what many of the circuit courts have said is the animating purpose of the ICA—to limit, not expand, the overall number of motor carrier regulations. For like reason, the dual references in the ICA to a specific exemption for the State of Hawaii, *see* 49 U.S.C. § 14501(b)(2) (preserving "the authority of the State of Hawaii" to regulate motor carriers), 49 U.S.C. § 14501(c)(4) (providing that subsection 14501(c) "shall not apply with respect to the State of Hawaii"), would oddly apply only to State laws enacted in Hawaii, but not to city regulations promulgated there.

Fourth, contrary to several of the courts of appeals' decisions, the addition of subsection § 14501(c)(2)(C) does not alter this analysis. In 1995, Congress added a provision to subsection (c)(2) specifying that the preemption provision "does not apply to the authority of a State or a political subdivision of a State to enact or enforce a law, regulation, or other provision relating to the price of for-hire motor vehicle transportation by a tow truck" if the towing is provided "without the prior consent" of the owner." 49 U.S.C. § 14501(c)(2)(C); Interstate Commerce Commission Termination Act (*see* Pub.L. 104-88, 109 Stat. 803 (1995)). In contrast to subsection (c)(2)(A), which carves out a broad exception for laws necessary to public "safety," subsection (c)(2)(C) creates a narrow exception for the prices of non-consensual towing. That subsection (c)(2)(C) tracks the

political bodies described in the preemption section ("State or a political subdivision of a State"), tracks one of the preempted subjects in that section ("price[s]") and tracks the lawmaking activity that is covered in that section ("to enact or enforce a law") highlights that Congress meant to do something different in the safety exemption, *see* 49 U.S.C. § 14501(c)(2)(A), which does none of these things. Thus, while "the view of a later Congress cannot control the interpretation of an earlier enacted statute," *O'Gilve v. United States*, 519 U.S. 79, 89 (1996), the addition of the price exemption for non-consensual towing in 1995 does not support the Sixth Circuit's decision. It merely confirms the conspicuous (and presumably purposeful) distinction between the broad "safety regulatory authority of a State" left intact by the ICA and the other provisions of the legislation.

In addition, as the Second Circuit in *Ace Auto* recognized, 171 F.3d at 775, this case ultimately turns on whether the language of 49 U.S.C. § 14501(c)(1) and (2) establishes that Congress meant to *prohibit* any and all *delegations* of safety regulatory authority by a State to its political subdivisions. As to that issue, this Court has stated that "[w]hen Congress legislates in a field traditionally occupied by the States, 'we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *California v. ARC Am. Corp.*, 490 U.S. 93, 101 (1989) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). Whatever else may be said in support of the Sixth Circuit's decision, it cannot tenably be maintained that these provisions of the ICA establish any such "clear and manifest purpose of Congress."

Finally, the legislative history of the ICA does not support the Sixth Circuit's decision. The history is utterly silent with

respect to a State's power to delegate its "safety regulatory authority" and demonstrates, at best, only Congress' general "deregulatory purpose." As even the Fifth Circuit has observed, "the history is ambiguous as to the scope of that purpose." *Stucky*, 2001 WL 863500, at *17. In light of this silence and ambiguity, the legislative history cannot be said to evidence any "clear and manifest purpose of Congress" to preempt a State's delegation of safety regulations.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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September 2001

APPENDIX

United States Court of Appeals,
Sixth Circuit.

OUR GARAGE AND WRECKER SERVICE*; Towing & Recovery Association of Ohio, Plaintiffs-Appellees,

v.

CITY OF COLUMBUS; David Wilson; Bobbie Beavers, Defendants-Appellants.

No. 00-3409.

Submitted June 7, 2001.

Decided and Filed June 19, 2001.

Affirmed.

Susan E. Ashbrook (briefed), Columbus City Atty's. Office, Columbus, OH, for Defendants-Appellants.

James G. Burkhardt (briefed), Office of the City of Toledo, Law Dept., Toledo, OH, for Amicus Curiae.

Before KEITH, BATCHELDER, and MOORE, Circuit Judges.

OPINION

BATCHELDER, Circuit Judge.

Plaintiffs Appellees Ours Garage and Wrecker Service, Inc. ("Ours"), an Ohio corporation operating a towing business in

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* Although the caption of the case has identified the plaintiff as "Our Garage" throughout the course of this litigation, the company's name in fact is "Ours Garage." We will refer to the company as "Ours Garage."

the City of Columbus, and the Towing and Recovery Association of Ohio ("TRAO"), a trade association of tow truck operators, brought suit against the City of Columbus (the "City") and certain of its officials to enjoin enforcement of Chapter 549 of the Columbus City Code (the "towing ordinance"), which regulates consensual towing operations. Specifically, Ours and TRAO alleged that the Interstate Commerce Act ("ICA"), 49 U.S.C. § 14501(c)(1), preempts the towing ordinance, which among other things requires the owners and operators of tow trucks to obtain a license from the City, maintain insurance, and comply with other regulatory requirements. *See generally* City of Columbus, Ohio, Code ch. 549 (1991). On cross-motions for summary judgment, the district court ruled in favor of Ours and TRAO and permanently enjoined the City from enforcing the towing ordinance. This appeal followed.

In *Petrey v. City of Toledo*, 246 F.3d 548, 555, 558-59, 564 (6th Cir.2001), we held that the ICA does not preempt municipal licensing and safety regulation of non-consensual towing operations when a municipality acts as a market participant, but does preempt other regulation not falling within this narrow exception. On appeal, the City concedes that *Petrey* controls the disposition of this case. Accordingly, we affirm the judgment of the district court permanently enjoining the City's enforcement of these towing provisions.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
No. 00-3409

FILED
JUN 19 2001
LEONARD GREEN, Clerk

OURS GARAGE AND WRECKER SERVICE;
TOWING & RECOVERY ASSOCIATION OF OHIO,
Plaintiffs - Appellees,

v.

CITY OF COLUMBUS; DAVID WILSON; BOBBIE BEAVERS,
Defendants - Appellants.

Before: KEITH, BATCHELDER, and MOORE, Circuit Judges.

JUDGMENT

On Appeal from the United State District Court
for the Southern District of Ohio at Columbus.

THIS CAUSE was heard on the record from the district court and was submitted on briefs without oral argument.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court permanently enjoining the City's enforcement of the towing provisions is AFFIRMED.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk
United States Court of Appeals,
Sixth Circuit.

Anna S. PETREY, d/b/a Magnum Towing,
Plaintiff-Appellee,

v.

CITY OF TOLEDO, Defendant-Appellant.

No. 99-4441.

Argued Nov. 29, 2000.
Decided and Filed April 2, 2001.

*550 John D. Latchney (argued and briefed), Reminger & Reminger, Cleveland, OH, for Appellee.

James G. Burkhardt (argued and briefed), Office of the City of Toledo Law Department, Toledo, OH, for Appellant.

Before DAUGHTREY and MOORE, Circuit Judges; CLELAND, District Judge.*

OPINION

MOORE, Circuit Judge.

Defendant, City of Toledo ("City" or "Toledo"), appeals the district court's order granting plaintiff-appellee Anna Petrey's motion for summary judgment with respect to her claim that various Toledo towing ordinances must be struck down under the preemption doctrine because they conflict with a federal statute, 49 U.S.C. § 14501(c). Toledo also appeals the district court's decision granting summary judgment to on her claim that Toledo's violation of 49 U.S.C. § 14501(c) constituted a

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* The Honorable Robert H. Cleland, United States District Judge for the Eastern District of Michigan, sitting by designation.

denial of her federal rights for which relief is available pursuant to 42 U.S.C. § 1983.

We AFFIRM in part and REVERSE in part the district court's decision in this case.

I. BACKGROUND

On April 3, 1998, Anna Petrey filed suit against the City of Toledo challenging the legality of the City's municipal towing provisions. *See* Toledo, Ohio, Mun. Code ch. 765 (1998). Petrey contends that a series of Toledo's towing ordinances are preempted by 49 U.S.C. § 14501(c), a federal statute which provides, with some important exceptions to be discussed later, that "a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier ... *551 with respect to the transportation of property."

Chapter 765 of the Toledo Municipal Code requires, with limited exceptions, that anyone operating a tow truck within the City obtain a towing license from the City's Director of Finance. Toledo Mun. Code § 765.02(a)-(b) (1998).[1] Two types of licenses are available to tow truck drivers: Class A and Class B. *Id.* § 765.02(a)(1), (2). A Class B license permits a tower to conduct private and third-party tows. *Id.* § 765.02(a)(2). A Class A license, however, in addition to private and third-party tows, permits the holder to conduct non-consensual tows ordered by the Toledo Police Department. *Id.* § 765.02(a)(1).

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[1] The City of Toledo amended Chapter 765 of its Code shortly before this lawsuit was filed. Under the modified provisions, the Class A and Class B "licenses" are now called "safety permits." Toledo Mun. Code § 765.02(a)(1)-(2) (1998). This modification does not affect our analysis. For semantical consistency with the parties and the district court, we will continue to refer to the permits as "licenses." All of the ordinances cited, unless otherwise noted, are current.

While both Class A and Class B applicants must meet certain requirements to be issued a license, the requirements for a Class A license are more onerous and expensive. To obtain a Class B license, an applicant must: 1) pay a filing fee, *id.* § 765.06(a)(1); 2) furnish a certificate of insurance evidencing that the tower is insured up to at least the City's prescribed minimum coverage, *id.* § 765.06(a)(2); 3) fill out an application listing general information about the business and its owners or partners, including any criminal record each owner or partner might have, *id.* § 765.06(a)(3)-(4); and 4) maintain a storage facility within City limits if the tower is to perform third-party tows in the City. *Id.* § 765.05(e)(4).

To obtain a Class A license, however, the applicant must: 1) pay a filing fee that is approximately four times as expensive as the Class B fee, *id.* § 765.03(a)(1); 2) maintain significantly more insurance coverage, *id.*765.03(a)(2); 3) ensure, for police tows only, the availability of at least three approved tow trucks, *id.* § 765.03(b)(4); 4) provide storage space for a minimum of one hundred vehicles, at least twenty-three of which must be at the licensed premises, *id.* § 765.03(b)(5); and 5) maintain a valid special use permit for any licensed premises and auxiliary storage site, *id.* § 765.03(b)(7).[2] If all of the Class A license requirements have been met, then the Director of Public Safety must approve the application.[3]

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[2] Until the 1998 revisions to Chapter 765, Toledo had imposed additional requirements for Class A applicants, some of which are challenged by Petrey in this lawsuit. These additional obligations included a requirement that all Class A applicants have conducted business in Toledo for at least two years prior to the date of application, as well as a heavy equipment commercial driver's license requirement for all of the applicant's tow drivers. Toledo Mun. Code § 765 03(c)(3), (5) (1997).

[3] This provision represents another change of course for the City of Toledo, for until the 1998 revisions, even though an applicant may have

The City is divided into a number of police towing districts, the amount and boundaries of which are also determined by the City's Director of Public Safety. *Id.* § 765.07(a)-(b). Police towing work in each towing district is rotated among the Class A license holders in that district. *Id.* § 765.07(c). For several years in the ***552** 1990s, the City had granted Class A licenses to the same eleven towing companies for all of the police towing in the city. *See* Rule of the Director of Public Safety No. 10034.[4]

Petrey's towing company, Magnum Towing, first began towing in 1991, and Petrey applied for and was issued a Class B towing license for that year. Petrey failed to renew her license in 1992 and 1993, however, and in 1994, one of Magnum's employees was cited for towing without a license. After renewing her Class B license following the citation, Petrey applied for a Class A license in March 1995. Plaintiff's application was denied both because she had not been legally conducting business in the City during the previous two years as required by Toledo's towing provisions, and because the Director of Public Safety had already limited the number of Class A licensees to eleven. Petrey also applied for a Class A license in both 1996 and 1997, and her applications were similarly rejected. In 1998, Petrey's application was returned to her because she had not provided the City with enough information to grant either a Class A or Class B permit.

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met all the requirements for a Class A license, this did not guarantee that a license would be awarded. § 765.07(c) (1997). Under the former provision, the Director of Public Safety ultimately determined how many Class A licenses would be granted based on the towing needs of the Police Department. *Id.*

[4] The City asserts that this Rule has since been rescinded. *See* § 765.04(a) (mandating that all Class A applicants who meet the City's requirements shall be granted a Class A license).

On April 3, 1998, Petrey filed suit in the United States District Court for the Northern District of Ohio seeking, on the grounds of preemption, "declaratory and injunctive relief precluding the City from enforcing those portions of Toledo Municipal Code Chapter 765 which deny and have denied Magnum a 'Class A' license and the right to perform non-consensual police tows." Joint Appendix ("J.A.") at 21 (Am. Compl.). More specifically, Petrey challenged the following Toledo towing provisions, all but one of which pertain only to Class A license holders: the storage space requirement, § 765.03(b)(5); the special use permit requirement, § 765.03(b)(6); the requirement that all Class A license holders have been in the towing business in the Toledo area for two years prior to applying for a Class A license, § 765.03(c)(3) (1997); the heavy equipment commercial driver's license requirement, § 765.03(c)(5) (1997); the Rule of the Director of Public Safety limiting the number of Class A licensees to eleven, Rule No. 10034; and the general requirement that all Toledo tow truck drivers obtain a special towing license from the City, § 765.02(c) (1997).[5] J.A. at 238 (Pl.'s Mem. in Supp. of Summ. J.).

Petrey also sought compensatory and punitive damages pursuant to 42 U.S.C. § 1983, alleging that the City, through its application of the towing provisions, had violated her equal protection and substantive due process rights. Petrey further claimed that the City had retaliated against her for exercising her First Amendment rights by selectively applying its towing

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[5] It is important to note that four of the six provisions specifically challenged by Petrey, including the general tow driver's license requirement in § 765.02(c), are no longer in effect. These provisions will not be at issue when discussing any potential injunctive or declaratory relief. We must still determine whether these provisions are preempted, however, for Petrey also seeks monetary damages pursuant to 42 U.S.C. § 1983 arising out of Toledo's enforcement of these provisions in violation of her alleged federal right not to be regulated.

provisions following her complaints about the Class A license requirements.

On February 16, 1999, the City of Toledo filed a motion for summary judgment as to Petrey's claims. The district court ***553** engaged in a lengthy preemption analysis and ultimately concluded that 49 U.S.C. § 14501(c) permitted states, but not political subdivisions like the City of Toledo, to engage in safety regulation that had been exempted from the statute's general preemption provision. *Petrey v. City of Toledo*, 61 F.Supp.2d 674, 676-80 (N.D.Ohio 1999). The district court further denied, without prejudice to renew, the City's motion for summary judgment as it pertained to Petrey's § 1983 claims. *Id.* at 680. The district court granted, however, the City's motion for summary judgment with respect to Petrey's First Amendment claim. *Id.* Finally, the district court granted leave to Petrey to file a motion for summary judgment by June 30, 1999. *Id.* at 681.

On June 30, 1999, Petrey filed a motion for summary judgment with respect to her claim that Chapter 765 of the Toledo Municipal Code is preempted by 49 U.S.C. § 14501(c). The City responded by renewing its motion for summary judgment with respect to Petrey's § 1983 claims. On October 21, 1999, the district court granted Petrey's motion for summary judgment, stating that the Toledo towing ordinances were preempted and ordering that the City be permanently enjoined from enforcing the provisions specifically challenged in Petrey's motion for summary judgment. The district court denied the City's motion for summary judgment with respect to Petrey's § 1983 claims, and, in light of its finding that Toledo's towing regulations were preempted by federal law, held that there was no genuine issue of material fact that Petrey was deprived of her federal right not to be regulated. Thus, the court held that the only issues left to be decided were the amount of damages, if any, that Petrey had suffered as a consequence of the City's regulations, and whether Petrey was

entitled to recover attorneys' fees, expenses, and costs under 42 U.S.C. § 1988. The district court further held that, pursuant to Fed.R.Civ.P. 54(b), there "was no just reason for delay of the City's appeal" of the permanent injunction prohibiting Toledo from enforcing its towing provisions. J.A. at 356 (D.Ct.Order, Dec. 16, 1999). The City's appeal to this court followed. Pending appeal to this court, the district court, noting that the City had granted Petrey a Class A license for the course of the litigation, ordered a stay of its previous order enjoining the City from enforcing certain sections of its towing regulations.

II. ANALYSIS

A. Standard of Review

This court reviews *de novo* a district court's decision to grant summary judgment. *Thomas v. United States*, 213 F.3d 927, 929 (6th Cir.2000). The moving party has the burden of establishing that there are no genuine issues of material fact, and that it is entitled to a judgment as a matter of law. Fed.R.Civ.P. 56(c). In reviewing the district court's decision to grant summary judgment, this court must view all the evidence in the light most favorable to the nonmoving party. *Thomas*, 213 F.3d at 929. Whether Toledo's towing provisions are preempted by 49 U.S.C. § 14501(c) is a question of law that this court reviews *de novo*. *King v. Ford Motor Co.*,209 F.3d 886, 891 (6th Cir.2000).

B. Preemption

The foundation of the preemption doctrine is the Supremacy Clause of the United States Constitution, which states that "the Laws of the United States ... shall be the supreme Law of the Land[,] ... any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. When ***554** applying the Supremacy Clause, courts are to "assum[e] that the historic police powers of the States [are] not to be superseded by [a] Federal Act unless that was the clear and manifest purpose of Congress." *Medtronic, Inc. v. Lohr*,

518 U.S. 470, 485, 116 S.Ct. 2240, 135 L.Ed.2d 700 (1996). We now turn to the text of the preemption provision and to the arguments that the parties have made.

1. 49 U.S.C. § 14501(c)'s Text and Legislative History

The general preemption provision of § 14501(c) was first passed in 1994 as part of the Federal Aviation Administration Authorization Act, which attempted, in part, to deregulate the motor carrier industry. *See* Pub. L. No. 103- 305, 108 Stat. 1569, 1606-07; *R. Mayer of Atlanta, Inc. v. City of Atlanta*, 158 F.3d 538, 541, 546 (11th Cir.1998). The general preemption rule, recodified in its current form under the Interstate Commerce Commission Termination Act ("ICCTA") of 1995, effective January 1, 1996, provides that "a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier ... with respect to the transportation of property." Pub. L. No. 104-88, 109 Stat. 803, 899 (codified at 49 U.S.C. § 14501(c)(1)).

There are two relevant exceptions to § 14501(c)(1)'s general preemption rule in this case. The first, passed in 1994 at the same time the general preemption provision was first enacted, allows the "State" to engage in various safety regulations without falling prey to the general preemption provision. *See* 49 U.S.C. § 14501(c)(2)(A).[6] The second exception to the general rule, added later pursuant to the ICCTA, permits a "State or a political subdivision of a State to enact or enforce

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[6] More specifically, § 14501(c)(2)(A) states that the general preemption provision "shall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self- insurance authorization[.]"

a law, regulation, or other provision relating to the price of for-hire motor vehicle transportation by a tow truck, if such transportation is performed without the prior consent or authorization of the owner or operator of the motor vehicle." 49 U.S.C. § 14501(c)(2)(C). Because § 14501(c)(2)(C) specifically exempts from preemption a state or political subdivision's regulation of the price of non- consensual tows, it is clear that Congress, when referring to "motor carriers" in the general preemption provision, had tow trucks in mind. *Cardinal Towing & Auto Repair, Inc. v. City of Bedford*, 180 F.3d 686, 690-91 (5th Cir.1999); *Mayer*, 158 F.3d at 543.

Rather than argue that Congress did not intend § 14501(c)(1) to apply to towing regulations,[7] the City of Toledo has pursued two alternate avenues by which it contends that § 14501(c)(1) cannot operate to preempt its towing ordinances. First, Toledo contends that the provisions challenged ***555** by Petrey all fall within § 14501(c)(2)(A), the exception to preemption allowing states to regulate the towing industry with respect to various safety concerns. For reasons that will be discussed in detail later, we find this argument unpersuasive. Toledo's second contention, however, has more merit. Rather than attempting to fit all of Toledo's towing provisions, concerning both consensual and non-consensual tows, into a statutory exception to § 14501(c)(1), Toledo argues in the alternative that its provisions setting the standards for towers who may conduct non-consensual, police-ordered tows on behalf of the City do not constitute laws, regulations, or provisions having the force and effect of law under § 14501(c)(1). Rather, the City contends that these provisions reflect nothing more than Toledo's desire, like any private market participant, to conduct

[7] All four circuits that have addressed the issue have held that § 14501(c)(1) does apply to state and local laws regulating towing services. *See Tocher v. City of Santa Ana*, 219 F.3d 1040, 1048 (9th Cir.2000); *Cardinal Towing*, 180 F.3d at 691; *Ace Auto Body & Towing, Ltd. v. City of New York*, 171 F.3d 765, 774 (2d Cir.1999); *Mayer*, 158 F.3d at 543.

its business with those towing companies that can provide the requisite facilities, experience, equipment, and service to satisfy fully the City's towing needs. In short, Toledo argues that even if its Class B license provisions, which deal with private tows, are preempted by § 14501(c)(1), its Class A license requirements fall under the municipal-proprietor exception to the preemption doctrine.[8] The Fifth and Ninth Circuit Courts of Appeals have recently upheld various municipal towing provisions under the municipal-proprietor exception to preemption, and we join those courts today in holding that Toledo, when acting as a market participant, may set certain standards and ultimately choose those towers which are best able to perform non-consensual police tows for it, without being subject to § 14501(c)'s preemption provisions.

2. Municipal Proprietor Exception to Preemption

Before delving into the circuit court cases recognizing the municipal- proprietor exception in the context of § 14501(c), we begin with the Supreme Court case that officially recognized that the municipal-proprietor exception, originally developed in the Court's dormant Commerce Clause jurisprudence, also applies to preemption cases. *See Building & Constr. Trades Council v. Associated Builders & Contractors of Massachusetts/Rhode Island, Inc.*, 507 U.S. 218, 226-27, 113 S.Ct. 1190, 122 L.Ed.2d 565 (1993). In *Associated Builders*, ***556** the Massachusetts Water Resources Authority ("MWRA"), an independent government agency given various water supply and treatment responsibilities by the Massachusetts Legislature, was issued a court order to clean

[8] The only Toledo towing provision not part of the Class A licensing requirements that Petrey has challenged is the requirement that all towers obtain a special City towing license before they can conduct tows within City limits. *See* Toledo Mun. Code § 765.02(c) (1997). The preemption analysis for this provision will be addressed separately from the challenged Class A license requirements.

up the Boston Harbor following a lawsuit arising out of the MWRA's failure to keep the Harbor clean. *Id.* at 220-21, 113 S.Ct. 1190. The court order required the clean-up project to proceed without interruption and made no allowance for delays arising out of labor disputes. *Id.* at 221, 113 S.Ct. 1190. Thus, the MWRA and Kaiser, MWRA's project manager for the cleanup, devised a labor agreement that attempted to assure labor stability over the course of the project. *Id.* at 221-22, 113 S.Ct. 1190. The agreement required the use of specific methods to resolve any labor disputes, and "that all employees be subject to union-security provisions compelling them to become union members within seven days of their employment[.]" *Id.* All contractors and subcontractors were required to comply with the labor agreement if they wished to work on the cleanup project. *Id.* at 222, 113 S.Ct. 1190.[9]

A company awarded a contract from MWRA sought to enjoin enforcement of the labor agreement, claiming that the labor agreement was preempted by the National Labor

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[9] "The negative or dormant implication of the Commerce Clause prohibits state taxation or regulation that discriminates against or unduly burdens interstate commerce and thereby impedes free private trade in the national marketplace[.]" *General Motors Corp. v. Tracy*, 519 U.S. 278, 287, 117 S.Ct. 811, 136 L.Ed.2d 761 (1997) (quotation and internal citations omitted). The Supreme Court's dormant Commerce Clause jurisprudence has consistently articulated the distinction between the State acting as a market regulator and the State acting as a market participant, explaining that "where a State acts as a participant in the private market, it may prefer the goods or services of its own citizens, even though it could not do so while acting as a market regulator." *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 685, 119 S.Ct. 2219, 144 L.Ed.2d 605 (1999). The Court noted that the market participant, or municipal-proprietor, exception makes sense in the dormant Commerce Clause context "because the evil addressed by those restrictions-the prospect that States will use custom duties, exclusionary trade regulations, and other exercises of governmental power ... to favor their own citizens-is entirely absent where the States are buying and selling in the market." *Id.* (citation omitted).

Relations Act ("NLRA"). *Id.* at 223, 113 S.Ct. 1190. The Court disagreed, and in doing so noted the important difference between the State's role as regulator and its role as a market participant. *Id.* at 226- 29, 113 S.Ct. 1190. The Court explained that "pre-emption doctrines apply only to state regulation[,]" and not to a State's actions when it acts in its proprietary capacity. *Id.* at 227, 113 S.Ct. 1190. Upon examining the MWRA's mandatory labor agreement for all contractors, the Court stated that, rather than this being an attempt to regulate the conduct of others, the labor agreement was simply an "attempt[ ] to ensure an efficient project that would be completed as quickly and effectively as possible at the lowest cost." *Id.* at 232, 113 S.Ct. 1190.

The Court contrasted this scenario to that in *Wisconsin Dep't of Indus., Labor & Human Relations v. Gould, Inc.*, 475 U.S. 282, 283-84, 106 S.Ct. 1057, 89 L.Ed.2d 223 (1986), in which Wisconsin enacted a statute forbidding its state procurement agents from purchasing any product known to be manufactured by labor law violators. *Associated Builders*, 507 U.S. at 228-29, 113 S.Ct. 1190. In *Gould*, the Court held that this procurement statute was preempted by the NLRA, stating that it could not "even plausibly be defended as a legitimate response to state procurement constraints or to local economic needs [.]" *Gould*, 475 U.S. at 291, 106 S.Ct. 1057. The Court viewed Wisconsin's conduct in enacting and enforcing the procurement statute as an attempt to use the State's spending power to deter violations of the NLRA, rather than as an effort by the State in its proprietary capacity to address a valid economic concern. *Associated Builders*,507 U.S. at 228-29, 113 S.Ct. 1190. As the Fifth Circuit explained, "[f]ollowing the logic of *Gould*, courts have found preemption when government entities seek to advance general societal goals rather than narrow proprietary interests through the use of their contracting power." *Cardinal Towing*, 180 F.3d at 692.

The Fifth Circuit, in *Cardinal Towing*, was the first court of appeals to apply the municipal-proprietor exception to the preemptive language of 49 U.S.C. § 14501(c)(1). In this case, the city of Bedford, Texas repealed a statutory scheme in which local towing companies that applied and met certain requirements were placed into a rotation to do the city police department's towing work. *Cardinal Towing*, 180 F.3d at 688-89. Bedford ***557** replaced this scheme with an ordinance simply stating that the city's non-consensual police tows would be conducted by the company that receives a contract from the city. Under the ordinance, contract applicants had to meet a number of requirements. Applicants had to guarantee a towing response time of no more than fifteen minutes, as well as ensure access to a class-eight wrecker, a large towing vehicle able to remove tractor-trailer trucks. The ordinance did not affect private towing arrangements in any way.

A towing company that applied for, but did not receive, the contract to do the city's police towing challenged the statute in federal court on the grounds that it was preempted by 49 U.S.C. § 14501(c)(1). Following the Supreme Court's holding in *Associated Builders*, the Fifth Circuit decided that Bedford's ordinance authorizing the city to award a contract to the single towing company that best met its requirements was not preempted by 49 U.S.C. § 14501(c). *Id.* at 691-94. The court held that the city's actions were akin to private market participation, in which, rather than trying to promote general societal goals, it was attempting to fulfill a "narrow proprietary interest in its own efficient procurement of services." *Id.* at 693. The court explained that selecting a single company allowed for administrative efficiency and easier monitoring of towing performance, and that the specifications for contract eligibility imposed by the city were all related to efficient and reliable towing. *Id.*

While the towing provision at issue in *Cardinal Towing* dealt exclusively with non-consensual police tows and allowed the

municipality to contract with only one towing company, the Ninth Circuit recently addressed a challenge to a broader towing scheme in Santa Ana, California, similar to Toledo's. *Tocher*, 219 F.3d at 1043. Santa Ana had enacted a number of towing provisions, many of which applied to all towers regardless of whether they performed towing work for the City. The general provisions created a permit requirement for both towing companies and tow truck drivers, and mandated that all towers maintain storage facilities, keep certain business hours, and publicly display towing rates. Another challenged provision, however, concerned only tows performed for the City police department. This provision authorized the chief of police to establish a towing rotation for non- consensual police tows, to establish the standards for placement in the rotation, and to limit that rotation to the number of towers she deemed necessary.

The Ninth Circuit held that all of Santa Ana's generally applicable towing provisions were preempted by § 14501(c)(1), as they all related to prices, routes, or services of the towing industry, and because none of the statutory exceptions to preemption applied. *Id.* at 1047-48, 1050-52. The court refused to preempt, however, the towing rotation for police-ordered tows, calling it a "classic example of a municipality acting as a market participant [,]" and noting that the provision "merely establish[es] rules and regulations to guide the formation of contracts for towing services provided exclusively to the City." *Id.* at 1049. The court further explained that while the provision at issue in the Fifth Circuit's decision in *Cardinal Towing* involved a contract for towing services with only one company, the fact that a city decides to contract with multiple companies for its police towing does not mean that it still cannot act under the municipal-proprietor exception to preemption. *Id.* at 1049-50.

The only difficulty the Ninth Circuit had with Santa Ana's police towing rotation provision was that it allowed only those

*558 towers who had obtained a City towing permit to participate in the rotation, the same generally applicable towing permit requirement that the court had just decided was preempted. *Id.* at 1050. The court held that, while the City could establish the standards and requirements for participation in the police towing rotation, it could not require that those towers obtain this generally applicable permit. Using the Santa Ana Municipal Code's severability provision, the court struck down that part of the rotation provision that required towers to obtain the permit. *Id.*

We join the Fifth and Ninth Circuit Courts of Appeals in holding that the municipal-proprietor exception applies to § 14501(c)(1). *See Tocher*, 219 F.3d at 1050; *Cardinal Towing*, 180 F.3d at 694-96. We agree with these circuits that the express preemption provision at issue in § 14501(c)(1) is strikingly similar to that in 29 U.S.C. § 1144(a), the ERISA preemption statute, and that because courts have consistently recognized the municipal- proprietor exception in the ERISA context, there is no good reason to limit the exception only to ERISA or NLRA cases. *Id.* We further agree that, aside from the statutory language, the municipal-proprietor exception is also consistent with the purpose of § 14501(c), which is to deregulate the motor carrier industry and "encourage market forces." *Cardinal Towing*, 180 F.3d at 695; see also *Tocher*, 219 F.3d at 1050.

We must now ask whether the municipal-proprietor exception saves any of Toledo's challenged towing ordinances from preemption under § 14501(c)(1). All but one of the ordinances challenged by Petrey relate solely to those towers wishing to perform non-consensual tows for the Toledo Police Department. The specific Class A license requirements that Petrey has challenged, along with the Rule of the Director of Public Safety limiting the number of Class A licensees to eleven, only affect the provision of towing services to the City itself. Like the police towing rotation provision in *Tocher*,

these non-consensual police-tow provisions simply reflect the City's attempts to create rules and standards that will lead to the safe and efficient towing and storage of vehicles that would otherwise clog the streets of the City of Toledo.

Section 14501(c)(1) does not prevent Toledo from choosing the towers with which it will do business. If Toledo did not have the ability to act as any other private market participant and decide who would perform its towing work, then it would arguably be forced to deal with all towers interested in getting work from the City, regardless of the tower's qualifications, equipment, or facilities. If § 14501(c)(1) preempted a City's efforts to set standards for those companies doing its police towing, then Toledo would have no choice but to work with towing companies with unusually slow response times or towers prone to damaging the cars they transport, so long as those towers wanted to work for the City. By setting standards for those companies who will be allowed to conduct police-ordered tows, Toledo can ensure that there will be sufficient space for the vehicles it needs to have towed, that any storage facilities to which the cars are towed will be safe, and that the drivers who operate the tow trucks will have the training to tow vehicles safely and efficiently. Furthermore, by limiting the number of participating towers in the Class A program, Toledo can ensure greater administrative efficiency and can better monitor the performance of all the towers involved.

Toledo's towing provisions dealing exclusively with non-consensual, police-ordered tows do not constitute attempts on the *559 part of the City to regulate the towing industry as a whole, or to advance some general societal goal. Instead, these provisions do nothing more than serve the City's narrow proprietary interest in working with those towing companies who will be most able to meet safely and efficiently the Toledo Police Department's towing needs.

For these reasons, we hold that the challenged Toledo towing provisions dealing solely with those towers wishing to perform non-consensual police tows for the City, along with the Rule limiting the number of police towers to eleven, are proprietary in nature, do not constitute regulation or have the force and effect of law, and thus are not preempted by 49 U.S.C. § 14501(c)(1).

3. Does § 14501(c)(1) Preempt Toledo Mun. Code § 765.02(c)?

The only provision Petrey challenges that does not deal exclusively with non-consensual, police-ordered tows is § 765.02(c) (1997), which requires that all tow drivers in the City obtain a special towing license. Because § 765.02(c) requires all tow drivers to obtain a special towing license, even those not doing work for the Toledo Police Department, it clearly does not fall within the narrow exception to preemption for municipal actions driven by a purely proprietary interest. Thus, we will have to determine whether either of the relevant statutory exceptions to preemption apply.

Like several of the other provisions Petrey has challenged, § 765.02(c) has been removed from Toledo's towing provisions since the filing of her lawsuit, and thus will not be at issue for purposes of any potential declaratory or injunctive relief. We must still determine whether this provision is preempted by § 14501(c)(1), however, for Petrey also seeks monetary damages arising out of Toledo's enforcement of the challenged provisions pursuant to 42 U.S.C. § 1983.

As stated earlier, Toledo does not argue that § 14501(c)(1) is inapplicable to its towing provisions. Section 14501(c)(1) prevents states or political subdivisions from "enact[ing] or enforc[ing] a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier ... with respect to the transportation of property[,]" and all of the circuits that have addressed this

provision have held that it applies to state and local laws regulating towing services. *See Tocher*, 219 F.3d at 1048; *Cardinal Towing*, 180 F.3d at 691; Ace Auto, 171 F.3d at 774; *Mayer*, 158 F.3d at 543. These courts have further held that ordinances similar to Toledo's do relate to a price, route, or service of the towing industry. *See Tocher*, 219 F.3d at 1047-48; *Cardinal Towing*, 180 F.3d at 691; *Ace Auto*, 171 F.3d at 771; *Mayer*, 158 F.3d at 545. Once it is acknowledged that § 765.02(c) relates to a price, route, or service of the towing industry, the plain language of § 14501(c)(1) preempts it, unless an exception to preemption applies.

a. The Statutory Exceptions to Preemption

Section 14501(c)(1)'s general preemption provision is subject to several exceptions. As mentioned earlier, § 14501(c)(2)(C) exempts from preemption the regulation of "the price of for-hire motor vehicle transportation by a tow truck, if such transportation is performed without the prior consent or authorization of the owner or operator of the motor vehicle." So, while a city or state's regulation of the price of non-consensual police tows is permitted, Toledo's license requirement for all tow drivers doing work in the ***560** City clearly does not fit within this exception.[10].

The only other exception that applies in this case, and the exception upon which Toledo focuses its arguments, is § 14501(c)(2)(A), which states that the general preemption provision in § 14501(c)(1) "shall not restrict the safety regulatory authority of a State with respect to motor vehicles ... or the authority of a State to regulate motor carriers with

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[10] Section 14501(c)(2)(C) allows political subdivisions to regulate the price of both private and police-ordered non-consensual tows. This exception does not apply to § 765.02(c)'s general towing license requirement, however, for § 765.02(c) is not a price regulation, nor does § 765.02(c) apply only to non-consensual tows.

regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization[.]" Toledo contends that all of its challenged towing provisions, including § 765.02(c), are statutorily excepted from preemption because they fall within the category of safety regulations. In determining whether Toledo's towing provisions are excepted from preemption under § 14501(c)(2)(A), we must answer two questions: 1) does the statutory language allowing the "State" to regulate the safety of motor vehicles apply to safety regulations by political subdivisions of states?; and 2) if so, do Toledo's towing provisions constitute safety regulations so as to fall under this exception to § 14501(c)(1)'s general preemptory language?

b. Does the Statutory Language of § 14501(c)(2)(A) Apply to Cities?

Section 14501, on numerous occasions, makes reference to the power of both states and "political subdivisions" of those states to enact laws or regulations in various areas of intrastate transportation. The general preemption provision of § 14501(c)(1) states that no "State [or] political subdivision of a State" may enact a law or regulation related to a "price, route, or service of any motor carrier ... with respect to the transportation of property." Section 14501(c)(2)(C), an exception to the general preemption provision, also explicitly exempts both states and political subdivisions of states from § 14501(c)(1) when regulating the price of non- consensual towing. And while the term "political subdivision[s]" is mentioned seven times in 49 U.S.C. § 14501, the term is notably absent from the exception to preemption in § 14501(c)(2)(A). Section 14501(c)(2)(A) states that the general preemption provision in § 14501(c)(1) "shall not restrict the safety regulatory authority of a *State* with respect to motor vehicles ... or the authority of a *State* to regulate motor carriers with regard to minimum amounts of financial

responsibility relating to insurance requirements and self-insurance authorization." (Emphasis added).

There is currently a conflict among the circuits regarding whether the omission of the "political subdivision" language in § 14501(c)(2)(A) reflects Congress's intent that safety regulation by political subdivisions not be exempted from preemption. The Ninth and Eleventh Circuits have held that this exception does not apply to safety regulation by political subdivisions. *Tocher*, 219 F.3d at 1050-51; *Mayer*, 158 F.3d at 545-48. The Second Circuit has come to the opposite conclusion, holding that safety regulation by political subdivisions does fall within the exception to preemption. *Ace Auto*, 171 F.3d at 775-76. After analyzing the statutory language and legislative history of § 14501, as well as Supreme Court and Sixth Circuit precedent, we align with the Ninth and Eleventh Circuits in holding ***561** that safety regulation by political subdivisions is not exempted from the general preemptory language of § 14501(c)(1).

(i) § 14501's Statutory Language

The language of § 14501 provides fairly convincing evidence that the safety regulation exception to preemption was not meant to apply to a state's political subdivisions. As mentioned above, within § 14501, "political subdivision[s]" are mentioned seven times, yet the term is not mentioned at all in § 14501(c)(2)(A). In addition, for purposes of this statute, the term "State" is defined as "the 50 States of the United States and the District of Columbia." 49 U.S.C. § 13102(18). The Supreme Court has held that when "Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23, 104 S.Ct. 296, 78 L.Ed.2d 17 (1983) (quotation omitted); *see also BFP v. Resolution Trust Corp.*, 511 U.S. 531, 537, 114 S.Ct. 1757, 128 L.Ed.2d 556 (1994) (same). Because the

term at issue is mentioned so frequently in § 14501, and yet is not mentioned at all in § 14501(c)(2)(A), the use of this presumption seems "particularly appropriate" in this case. Mayer, 158 F.3d at 545. Applying this presumption in this case, we hold that, while states may regulate the safety of motor carriers, political subdivisions may not.

In *Ace Auto*, the Second Circuit relied, in part, on *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 111 S.Ct. 2476, 115 L.Ed.2d 532 (1991), in finding that § 14501(c)(2)(A) exempts political subdivisions' safety regulation from preemption. *Ace Auto*, 171 F.3d at 775-76. *Mortier* appears readily distinguishable from this case, however. *Mortier* involved the interpretation of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"). *Mortier*, 501 U.S. at 600-02, 111 S.Ct. 2476. This statute dictates that states may regulate the sale or use of pesticides so long as it is not prohibited by FIFRA. FIFRA contains no general preemption provisions from which states are excluded, nor does it explicitly preempt regulation by political subdivisions. *Id.* at 606, 111 S.Ct. 2476. The Supreme Court, "start[ing] with the assumption that the historic police powers of the States [are] not to be superseded by the Federal Act unless that [is] the clear and manifest purpose of Congress[,]" *id.* at 605, 111 S.Ct. 2476, held that the statutory language and the legislative history of FIFRA never overcame that presumption, and that local regulation of pesticides was not preempted under the Act. *Id.* at 605-16, 111 S.Ct. 2476. The Supreme Court recognized that "FIFRA nowhere expressly supersedes local regulation of pesticide use [,]" *id.* at 606, 111 S.Ct. 2476, and further determined that, because states are permitted to regulate pesticides so long as they remain consistent with FIFRA, and because "political subdivisions are components of the very entity the statute empowers[,] ... the more plausible reading of FIFRA's authorization to the States leaves the allocation of regulatory authority to the 'absolute discretion' of the States themselves, including the option of leaving local

regulation of pesticides in the hands of local authorities." *Id.* at 608, 111 S.Ct. 2476.

Unlike FIFRA, 49 U.S.C. § 14501 does contain express preemptory language prohibiting political subdivisions from regulating the towing industry. While we also start with the presumption that a state's police powers are not to be superseded by a federal statute unless it is the clear purpose of Congress, § 14501(c)(1) plainly states Congress's desire to preempt state and local regulation of the towing industry, ***562** with limited exceptions. The Eleventh Circuit's opinion in *Mayer* further highlights the differences between FIFRA and § 14501(c):

> In *Mortier*, the Court faced a claim that the use of the word "State" without mentioning political subdivisions revealed Congress' "clear and manifest purpose" to preempt local regulation. In response, the Court held that Congress' silence concerning political subdivisions is not sufficient to satisfy this rigorous standard. Section 14501(c)(1), on the other hand, expressly preempts all state and local regulation of certain aspects of the motor transportation industry, and the question we must answer is whether Congress' silence in an exception to this rule implies that political subdivisions are to be included within the exception.... [J]ust as the statutory silence in *Mortier* was insufficient to establish preemption in the first place, so the statutory silence here is insufficient to overcome the preemption otherwise expressly mandated by the statute.

Mayer, 158 F.3d at 547 n. 7 (quotation omitted).

Section 14501 and FIFRA also differ in the number of references each statute makes to "political subdivisions." As the *Mayer* court explained, the specific FIFRA provision interpreted in *Mortier* made no reference to political

subdivisions whatsoever, "and FIFRA as a whole contains only scattered mention of political subdivisions in its other parts." *Id.* at 547 (quotation omitted). We contrast FIFRA with § 14501, which contains seven references to political subdivisions overall, a reference to political subdivisions in the general preemption provision, and a reference to political subdivisions in one of the exceptions to the general preemption provision. § 14501(c)(2)(C). The natural conclusion derived from this language is that Congress did not intend to exempt political subdivisions from preemption when they attempt to engage in safety regulation.

Sixth Circuit case law also supports this conclusion. In *CSX Transp., Inc. v. City of Plymouth*, 86 F.3d 626, 627-29 (6th Cir.1996), we analyzed whether a municipal ordinance enacted pursuant to state constitutional authority was preempted under the Federal Railway Safety Act ("FRSA"). The FRSA, as Congress intended, "preempt[s] all railroad safety legislation except state law governing an area in which the Secretary of Transportation has not issued a regulation or order and state law more strict than federal regulations when necessary to address local problems." *Id.* at 628. In *Plymouth*, the City, acting pursuant to its authority under the Michigan Constitution, enacted several railroad regulations. *Id.* at 627-28. Plymouth argued that, while the statutory language only explicitly exempted from preemption state regulation of railroad safety, the city should come within this exception to preemption as well, particularly because it was acting pursuant to the Michigan Constitution. *Id.* at 628. We quickly dismissed the City's argument, however, holding that the exceptions to preemption under the FRSA apply only to state laws or regulations, and that because Plymouth is not a state, Plymouth's ordinance cannot come within the exceptions to preemption. *Id.*

The facts in *Plymouth* are quite similar to those in this case. Just as in *Plymouth*, Toledo asks that we include its safety

regulations within § 14501(c)(2)(A)'s exception to preemption. Like the FRSA in *Plymouth*, § 14501(c)(1) expressly preempts municipal regulation of the towing industry, but does not explicitly exempt municipal safety regulation from the general preemption provision. Just as in *Plymouth*, we refuse to include cities within an exception ***563** to preemption, the language of which is conspicuously devoid of any reference to political subdivisions.

Ohio Manufacturers Ass'n v. City of Akron,801 F.2d 824 (6th Cir.1986), *cert. denied*, 484 U.S. 801, 108 S.Ct. 44, 98 L.Ed.2d 9 (1987), also provides support for holding that § 14501(c)(2)(A) does not exempt municipal safety regulation from preemption. In that case we analyzed a rule of the Occupational Safety and Health Agency ("OSHA") that expressly preempted any "state law" pertaining to evaluating and communicating hazards to employees in the manufacturing sector. *Id.* at 827. Plaintiffs in the case argued that since state law was preempted, then necessarily municipal law would be preempted as well. *Id.* at 828. Defendants countered that if OSHA wished to preempt local regulation, it could easily have done so explicitly. *Id.* We held that municipal regulation was not preempted by this rule, stating that "[based on Congress' practice of explicitly preempting political subdivisions and the fact that political subdivisions are referred to in other sections of the OH Act, ... Congress did not simply overlook including political subdivisions[, nor did] it implicitly include[] them in the word 'state.' " *Id.* at 829.

The same rationale applies to the current case. Congress explicitly mentioned political subdivisions numerous times in § 14501, including its explicit preemption of political subdivisions' regulation in § 14501(c)(1). We cannot say that Congress simply made a mistake by failing to include political subdivisions in the exception to preemption in § 14501(c)(2)(A). Instead, Congress's silence in failing to include political subdivisions in § 14501(c)(2)(A) clearly

indicates that municipal safety regulation was not meant to be exempted from preemption.

(ii) Legislative History and Purpose

The legislative purpose and history of § 14501 also support the notion that Congress's failure to include political subdivisions in § 14501(c)(2)(A) was deliberate. Through the ICCTA, Congress intended to promote greater competition in the motor transportation industry. *Mayer*, 158 F.3d at 546. As expressed in the ICCTA's conference report, one of the means by which Congress intended to encourage market forces was through the elimination of a myriad of complicated and potentially conflicting state regulations, thus indicating that yet another level of regulation at the local level would be disfavored:

> [T]he conferees believe preemption legislation is in the public interest as well as necessary to facilitate interstate commerce. State economic regulation of motor carrier operations causes significant inefficiencies, increased costs, reduction of competition, inhibition of innovation and technology and curtails the expansion of markets.... The sheer diversity of these regulatory schemes is a huge problem for national and regional carriers attempting to conduct a standard way of doing business.

H.R. Conf. Rep. No. 103-677, at 87 (1994), *reprinted* in 1994 ISKCON 1715, 1759. As the Eleventh Circuit correctly stated, "it is reasonable to assume that Congress decided that safety and insurance ordinances must be enacted on a statewide level, in order to minimize the disturbance to the motor transportation industry that a patchwork of local ordinances inevitably would create." *Mayer*, 158 F.3d at 546.

In light of both the statutory language and legislative history of § 14501, we hold that Toledo does not have the authority to engage in safety regulations under § 14501(c)(2)(A). Because

Toledo may not avoid preemption under this exception, we need not address the issue whether ***564** § 765.02(c), or any of Toledo's other challenged provisions, constitute safety regulations that would fall within § 14501(c)(2)(A)'s exception to preemption.

To summarize, we hold that the towing provisions which Petrey has challenged that relate solely to the performance of non-consensual towing work for the City of Toledo fall within the municipal-proprietor exception to preemption, and thus are not affected by § 14501(c)(1). The City's general license requirement for all City tow drivers, however, is not covered by this narrow exception to preemption, nor do any of the statutory exceptions to § 14501(c)(1) apply. Therefore, § 765.02(c), though no longer a part of the Toledo Municipal Code, is preempted by § 14501(c)(1), and should not have been enforced against Petrey or any other towers within the City. Thus, the district court's decision granting Petrey's motion for summary judgment with respect to her preemption claims is AFFIRMED in part and REVERSED in part.

C. Petrey's 42 U.S.C. § 1983 Claims

In Petrey's amended complaint, she alleged that the City's use of its towing regulations in spite of the federal preemption provision was injurious to her. She sought damages as a result. Both Petrey and the City have treated this claim as one arising under 42 U.S.C. § 1983. The district court, after denying Toledo's motion for summary judgment with respect to Petrey's § 1983 claims, held that, in light of its finding that Toledo's challenged towing regulations violated the express preemption provisions of 49 U.S.C. § 14501(c), there was no genuine issue of material fact that Petrey was deprived of her federal right not to be regulated, and that Toledo's violation of § 14501(c) was "a sufficient basis for plaintiff's 42 U.S.C. § 1983 claims." J.A. at 312 (D.Ct.Order, Oct. 21, 1999). While we have concluded that all but one of Toledo's challenged towing provisions are not preempted by § 14501(c)(1), § 1983 relief

may still be available if we conclude that Toledo's enforcement of § 765.02(c), the challenged provision that we have held to be preempted, violated any federal right Petrey has not be regulated.

Cities can be sued directly under § 1983. *Monell v. Dep't of Soc. Serve.*,436 U.S. 658, 690, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). In the landmark case of *Maine v. Thiboutot*, 448 U.S. 1, 4-8, 100 S.Ct. 2502, 65 L.Ed.2d 555 (1980), the Supreme Court held that § 1983 suits are available when those acting under color of state law violate federal statutes. A two-step inquiry is used to determine whether § 1983 remedies are available for a violation of a federal statute. *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 106, 110 S.Ct. 444, 107 L.Ed.2d 420 (1989). The plaintiff must first assert a violation of a federal right. *Id.* To violate a federal right, the federal provision at issue must create a clear obligation that binds the governmental unit, and not simply state a "congressional preference for certain kinds of treatment." *Id.* (quotation omitted). In addition, the Court requires that the asserted right not be so vague or amorphous such that it is beyond the competency of the judiciary to enforce. The Court also asks whether the provision at issue was intended to benefit the plaintiff. *Id.*

The second step of the inquiry is to ask, even if the plaintiff has asserted a federal right, whether the defendant can "show that Congress specifically foreclosed a remedy under § 1983 by providing a comprehensive enforcement mechanism for protection of a federal right[.]" *Id.* (quotation omitted). The burden of showing that a federal statute's enforcement ***565** scheme precludes § 1983 relief is on the defendant, and the Court does not lightly conclude that Congress did not intend for § 1983 relief to be available to enforce a federal statute. *Id.* at 106-07, 110 S.Ct. 444.

In *Golden State*, the Supreme Court, following its previous decision that Los Angeles's attempts to condition the award of

a taxicab operating license on the cab company's settlement of a labor dispute were preempted by the NLRA, held that § 1983 relief was available for the cab company due to the city's unlawful interference with the collective bargaining process. *Id.* at 108- 13, 110 S.Ct. 444. The Court held that the NLRA did not have any "comprehensive enforcement scheme for preventing state interference with federally protected labor rights[,]" and that there was no question that the Court's previous holding that the city's conduct was preempted was within the competence of the judiciary to enforce. *Id.* at 108-09, 110 S.Ct. 444. The Court further held that the cab company was the intended beneficiary of the NLRA's provisions preempting state and local interference with the collective bargaining process. *Id.* at 109, 110 S.Ct. 444.

Based on the analysis in *Golden State*, it is clear that the first step of the inquiry is met in Petrey's case. Like the cab company in *Golden State*, Petrey's towing company was certainly the intended beneficiary of 49 U.S.C. § 14501(c)(1)'s express prohibition on state and local regulation of the towing industry. Arguably, the preemption provision at issue in this case speaks even more clearly than the NLRA, which does not contain an express preemption provision, that states and municipalities are not to regulate the towing industry, except for certain narrow exceptions. Thus, Petrey had a federal right under the preemption provision, and because Toledo regulated the towing industry in violation of that provision, Petrey was deprived of her federal right in this case.

As for the second step of the inquiry, the district court has convincingly shown that 49 U.S.C. § 14501 does not have a comprehensive enforcement mechanism that would preclude § 1983 relief for those injured due to unlawful state or local regulation of the towing industry. J.A. at 311-12 & n. 3 (D.Ct.Order, Oct. 21, 1999). The district court correctly noted that while the ICCTA, of which § 14501 is a part, does have enforcement provisions, 49 U.S.C. §§ 14701-14709, none of

these provisions allows Petrey to seek any form of relief against states or municipalities for unlawful regulation in violation of § 14501(c).

Because Petrey's federal right under § 14501(c) not to be regulated was violated, and because § 1983 relief was available for the violation of that right, we remand this case to the district court for a determination of the amount of damages, if any, that Petrey has incurred due to the violation of her federal right, as well as whether Petrey is entitled to attorneys' fees, expenses, and costs under 42 U.S.C. § 1988. It is important to note, however, that because the challenged Class A license requirements are not preempted, Toledo, in applying these Class A license provisions, has not violated Petrey's federal right not to be regulated. Thus, no damages can be awarded based on the City's decision to deny Petrey's towing company the opportunity to perform non-consensual tows for the Toledo Police Department.

III. CONCLUSION

For the foregoing reasons, we AFFIRM in part and REVERSE in part the district court's decision granting Petrey's motion for summary judgment on her preemption ***566** claims. We also AFFIRM the district court's decision that Petrey was denied a federal right for which § 1983 relief is available, and REMAND to that court for a determination of the amount of damages, if any, that Petrey has incurred.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

FILED
KENNETH J. MURPHY
CLERK
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U.S. DISTRICT COURT
SOUTHERN DIST. OHIO
EAST. DIV. COLUMBUS

Ours Garage & Wrecker Service, et al.,

Plaintiffs,

-v-

Case No. C-2-0310
JUDGE SMITH
Magistrate Judge King

City of Columbus, et al.,

Defendants.

ORDER

This case present the issue whether municipal regulations affecting consensual towing are preempted by provisions of the Interstate Commerce Act ("ICA"), as amended, 42 U.S.C. § 14501(c)(1). The facts are not disputed, and the case presents a purely legal issue. Plaintiffs move for summary judgment and injunctive relief (Doc. 10), and defendants move for summary judgment (Doc. 12).

Section 549.02 of the Columbus City Code provides in pertinent part:

> ...No owner of tow truck shall permit said tow truck to be used for the purpose of towing within the City limits unless a valid truck owner's license obtained

pursuant to this chapter has been issued and is in force for that tow truck.

No tow truck operator shall engage in the towing of any vehicle within the City of Columbus or offer such service to the owner or operator of any vehicle unless a valid tow truck operator's license is obtained pursuant to this chapter has been issued and is in force for that tow truck operation...

The ICA provides in part as follows:

General Rule - Except as provided in paragraph (2) and (3), a State, [or a] political subdivision of a State, ...may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor ...with respect to the transportation of property.

49 U.S.C. § 14501(c)(1). The exceptions to the general rule allow "a state" to regulate safety and financial responsibility. 49 U.S.C. § 14501(c)(2)(A). Defendants argue that "a state" includes political subdivisions of a state; plaintiffs argue it does not.

The Court holds as a matter of law that the subject Columbus City Code section is preempted by the ICA for the reasons set forth in a decision issued in a virtually identical cases of *R. Mayer of Atlanta, Inc. v. City of Atlanta*, 158 F.3d 538, 545-48 (11 Cir. 1998), *cert. denied*, 119 S. Ct. 1334 (1999) and *Anna Petrey dba Magnum Towing v. City of Toledo*, 61 F. Supp.2d 674, 677-680 (N.D. Ohio 1999). That is, the Court concludes that, as a matter of statutory construction, the exceptions to the general rule stated in 49 U.S.C. § 140501(c)(1) apply only to states, and not municipalities. In reaching this conclusion, the Court declines to follow *Ace Auto Body & Towing v. City of New York*, 171 F.3d 765 (2nd Cir.), *cert. denied*, 120 S. Ct. 166 (1999) because the statutory construction by the court in *Ace* does not comport with that of

the Sixth Circuit Court of Appeals in examining a similar statutory scheme. *See CSX Transportation, Inc. v. City of Plymouth*, 86 F.3d 626, 628 (6th Cir. 1996). But see *New Orleans Towing Ass'n. Inc. v. City of New Orleans*, 2000 WL 19307 (E.D. La. Feb. 15, 2000) (following *Ace*).

The Court grants plaintiff's motion for summary judgment and injunctive relief (Doc. 10), and denies defendants' motion for summary judgment (Doc. 12). Plaintiffs' motion for a preliminary injunction (Doc. 2) is moot.

The Clerk shall enter a final judgment in favor of plaintiffs, and against defendants, permanently enjoining defendants from applying or enforcing Chapter 549 of the Columbus City Code with respect to the plaintiffs named in this action or any members of plaintiff TRAO.

The Clerk shall remove this case from the Court's pending cases and motions lists.

IT IS SO ORDERED

/s/ George C. Smith
GEORGE C. SMITH, JUDGE
UNITED STATES DISTRICT COURT

Chapter 549
TOW TRUCKS

Sections:

549.01 **Definitions.**
549.02 **License required.**
549.03 **License application.**
549.035 **License for partial year.**
549.04 **Issuance of licenses.**
549.05 **Expiration of license.**
549.06 **Assignment or transfer of licenses.**
549.065 **Responding to the scene of an accident.**
549.07 **License denial, suspension or revocation.**
549.08 **Hearing on charges; decision.**
549.09 **Advisory board.**
549.10 **Function of the Board.**
549.11 **Judicial review.**
549.12 **Official acts used as evidence.**
549.13 **Separability clause.**
549.14 **Liability insurance required.**
549.15 **Extent of insurance.**
549.16 **Identification of tow trucks.**
549.17 **Transport sheet required.**
549.18 **Required records.**
549.19 **Notice of conviction (Repealed)**
549.20 **Authority to issue rules and regulations.**
539.99 **Penalties.**

Cross Reference

Impounding vehicles - see TRAF. Ch. 2107

549.01 Definitions.

(a) "Wrecker" or "tow truck" means every motor vehicle which is designed and used to tow or transport any other motor vehicle. For the purpose of this chapter, the terms wrecker and tow truck shall be synonymous.

(b) "Owner" means a person who holds the legal title of a tow truck, or in the event a tow truck is the subject of an agreement for the conditional sale or lease thereof with the right of purchase upon performance of the conditions stated in the agreement and with an immediate right of possession vested in the conditional vendee or lessee, then such conditional vendee or lessee shall be deemed the owner for purposes of this chapter.

(c) "Driver" or "operator" means every person who drives or is in actual physical control of a tow truck on a public street or public right of way within the City of Columbus.

(d) "Person" means every natural person, firm, copartnership, association or corporation.

(e) "Director" means the Director of Public Safety of the City of Columbus.

(f) "Towing" means the act of pulling or dragging any vehicle behind the wrecker or two truck which is doing such pulling or dragging. Said towed vehicle can be self supporting, carried on a dolly type platform, or be supported on any other item necessary to facilitate such towing. (Ord. 1081-75).

549.02 License required.

No owner of a tow truck shall permit said tow truck to be used for the purpose of towing within the City limits unless a valid tow truck owner's license obtained pursuant to this chapter has been issued and is in force for that tow truck.

No tow truck operator shall engage in the towing of any vehicle within the City of Columbus or offer such service to the owner or operator of any vehicle unless a valid tow truck operator's license obtained pursuant to this chapter has been issued and is in force for that tow truck operator.

This section shall not apply when the property being towed is owned by the person doing the towing of said property or

when the property being towed has been picked up outside the City and is either in the process of being delivered to a location within the City or is being towed through the City to be delivered elsewhere.

Evidence of the ownership of a vehicle being towed shall be presented to any police officer or inspector upon demand and shall consist of either a certificate of title or a bill of sale for said vehicle (ord. 641-77).

549.03 License application.

Every application for such license as required by Section 549.02 shall be made in person at the office of the Director of Public Safety on forms to be provided and such pertinent information as the Director may deem necessary shall be given under oath. It shall be mandatory rejection of such application or revocation of any issued license of any of the required application information is misrepresented or untrue.

(a) Each tow truck license shall be issued upon payment of a seventy-five dollar ($75.00) fee, per year, per truck. Each application for the replacement of a lost, stolen or missing license shall be accompanied by five dollars ($5.00).

(b) Each tow truck operator shall be issued upon payment of a twenty-five dollar ($25.00) fee, and renewals thereof may be issued for a fee of fifteen dollars ($15.00). Each application for the replacement of a lost, stolen or missing license shall be accompanied by a fee of five dollars ($5.00).

(c) If for any reason an application is rejected and no license issued, all accompanying fees shall be returned to the applicant, otherwise the fees collected under the provisions of this chapter shall be placed to the credit of the General Fund of the City of Columbus. (Ord. 454-87).

549.035 License for partial year.

(a) The fee for any tow truck license obtained after the first day of March of any year shall be one-half of the original fee.

(b) The fee for any tow truck operator's license required pursuant to this chapter shall remain unaffected by the terms of this section. (Ord. 1174-73.)

549.04 Issuance of licenses.

(a) Upon approval of a tow truck owner's application, a license and window sticker shall be issued to the owner by the Director of Public Safety. The window sticker shall be placed in the lower right hand corner of the windshield of the licensed tow truck.

(b) Upon approval of a tow truck operator's application, a license shall be issued to the operator which will be carried when in physical control of a tow truck. This license shall be available for inspection upon request of the Director or a police officer. (Ord. 1677-71.)

549.05 Expiration of license.

All tow truck owner licenses issued pursuant to the provisions of this chapter shall expire on the first day of September, 1991, and on September 1 of each year thereafter, following issuance, unless revoked by the Director of Public Safety.

All tow truck operator licenses issued pursuant to the provisions of this chapter shall expire on the first day of December, 1991, and on December 1 of each year thereafter, following issuance, unless revoked by the Director of Public Safety. (Ord. 1534-91.)

549.06 Assignment or transfer of licenses.

(a) No license issued for any tow truck under the provisions of this chapter shall be assigned or transferred to

any other tow truck without the approval of the Director of Public Safety.

(b) No license issued to any tow truck operator under the provisions of this chapter shall be assigned or transferred to any other person. (Ord. 1677-71.)

549.065 Responding to the scene of an accident.

No person, firm, corporation, or other entity shall respond to the scene of an accident, vehicle breakdown or other disabled vehicle for the purpose of soliciting business, or service for compensation of any kind whatsoever unless either summoned by a person having a direct interest in the vehicle or vehicles involved or dispatched thereto as provided in the rules and regulations promulgated by the Safety Director pursuant to Section 549.20. (Ord. 1123-84.)

549.07 License denial, suspension or revocation.

The Director of Public Safety may deny the issuance of any tow truck owner's or operator's license to any person who fails to furnish satisfactory evidence of a good moral character, or to any person who, upon investigation, clearly lacks qualifications and fitness to be licensed under this chapter. Any license granted or issued pursuant to the terms of this chapter to an owner or an operator may be suspended or revoked at any time by the Director upon satisfactory proof of the violation of any provision of this chapter, or upon satisfactory proof of the violation of any of the rules and regulations which the Director promulgates pursuant to Section 549.20, or for any of the reasons which could have been grounds for the refusal to issue an original license. If a license is suspended or revoked after a hearing as set forth in Section 549.08, said license shall be surrendered to the Director's office within five (5) days of notification of such suspension or revocation and the window sticker shall be destroyed.

Any violation of the rules and regulations pertaining to the volunteer towing list will, upon satisfactory proof to the director, result in the immediate proof to the Director, result in the immediate removal of the offending tow truck or tow truck operator from said list. The removed party shall be given the opportunity to appear before the Wrecker Advisory Board for the purpose of explaining the activities which led to the removal from said list, or for the purposes of refuting any evidence presented which led to the removal from said list. Notice of the removal from the volunteer towing list shall be sent to the removed party within three (3) days following removal. Notice of intent on the part of the removed party to appear before the Wrecker Advisory Board shall be sent to the Safety Director's office within three (3) days following receipt of notification of removal from the list. In the event the said violation warrants, further action may be taken against the tow truck or two truck operator pursuant to the terms as set forth in this section. (Ord. 1081-75.)

549.08 Hearings on charges; decision.

No license shall be suspended or revoked until after a hearing had before a hearing officer or employee designated for such purpose by the Director of Public Safety. Notice to the licensee shall be served either personally or by registered mail and shall state the date and place of hearing and set forth the ground or grounds constituting the charges against the licensee. The licensee or registrant shall be heard in his defense either in person or by counsel and may produce witnesses and testify in his own behalf. A stenographic record of the hearing may be taken. The hearing may be adjourned from time to time. The person conducting the hearing shall make a written report of his findings and a recommendation to the Director for decision. A copy of the written report shall be sent to the counsel and to the advisory board. The Director shall review such findings and the recommendation and, after due deliberation, shall issue an order, accepting, modifying or

rejecting such recommendation and dismiss the charges or suspending or revoking the license. For the purpose of this section the Director or any hearing officer or employee designated by him, may administer oaths, take testimony, subpoena witnesses, and compel the production of books, papers, records, and documents deemed pertinent to the subject of investigation. (Ord. 1677-71.)

549.09 Advisory board.

(a) There is hereby established a Wrecker Advisory Board in the Office of the Director. The Board shall consist of the Director or his designate, and four (4) other members appointed by the Mayor, and one of the members so appointed by the Mayor, and one of the members so appointed shall be designated by the Mayor as Chairman. Of the four (4) appointed members, two (2) shall be actively engaged in the wrecker, towing business, one representing the owners and one the drivers; and one (1) shall be a public member; and one (1) shall be a member of the insurance industry. Each appointed member shall serve for a term of four (4) years and until his successor is appointed and qualified except for the first two appointees who shall serve for two years each. Of the first members appointed to serve on this Advisory Board, two (2) shall be appointed for a term of two (2) years, and two (2) for a term of four (4) years.

(b) The members of the Board shall serve without compensation but may be reimbursed for their actual and necessary expenses in attending meetings of the Board.

(c) The Advisory Board shall meet at least two (2) times each year at a time and place within the state designated by the Director. (Ord. 1677-71.)

549.10 Function of the Board

(a) The Board shall advise and consult with the Director of Public Safety concerning practices in the wrecker, towing

business, the administration of this chapter, and the rules and regulations adopted to implement this chapter.

(b) The Board shall undertake activities to encourage high standards of honesty, fair business practices, and public responsibility in the wrecker, towing business, and

(c) The Board shall hear and make recommendations to the Director in any application revocation or suspension proceeding in which the Director may request the Board to conduct such hearings.

(d) The City Attorney shall designate a member of his staff to act and serve as counsel to the Advisory Board to be present at or to review and summarize all hearings and proceedings for suspension and revocation of licenses. (Ord. 1677-71.)

549.11 Judicial review.

The action of the Director of Public Safety in suspending, revoking, or refusing to issue or renew a license may be reviewed by appeal to the Board of License Appeals pursuant to Section 505.06. The Director shall be represented by the City Attorney. (Ord. 2666-80.)

549.12 Official acts used as evidence.

The official acts of the Director of Public Safety and Department shall be prima-facie evidence of the facts therein and shall be entitled to be received in evidence in all actions at law and other legal proceedings in any court or before any board, body or officer. (Ord. 1677-71.)

549.13 Separability clause.

If any portion of this chapter, or any section or part of a section shall be declared by a court of competent jurisdiction to be invalid, such declaration shall be limited solely to that portion, section, or part of section that was directly involved in the controversy before the court upon which judgment was

rendered, and shall not affect or impair the validity of the remainder of the chapter. (Ord. 1677-71.)

549.14 Liability insurance required.

(a) No license to operate any wrecker or tow truck shall be issued or renewed by the Director of Public Safety and it shall be unlawful to operate or permit the operation of any such wrecker unless and until the owner of the same shall deposit and maintain on deposit with the Director a copy of an existing insurance policy or evidence acceptable to the Director of such policy of an insurance company duly licensed to transact such business in the State, or of an insurance company not authorized to transact business in the State, provided such insurance is written through a citizen of the State duly licensed as provided by Ohio Revised Code 3905.30 et seq., insuring within the amounts specified in such policy the owner of such tow truck and also any person operating the same in the City under the authority of such owner, whether such authority be under contract or employment, lease, or other transaction of the owner or owner's assignee or lessee and such person operating such wrecker against loss from the liability imposed by law for damages on account of bodily injuries or death or for damages to property, other than employees, resulting from such ownership, maintenance or use of such wrecker in the City, and agreeing to pay to any judgment creditor to the extent of the respective amounts specified in such policy, any final judgment rendered against the insured or such operator by reason of such liability.

(b) In addition to the insurance required in subsection (a) hereof, a garage keeper's legal liability policy covering fire, theft, and explosion shall be required.

A company not storing vehicles may, on approval of the Director of Public Safety, submit an affidavit which shall state that liability coverage is in effect to cover each vehicle towed

while in their care, custody and control pursuant to Section 549.15(b). A violation of the terms contained in the two owner insurance affidavit will be cause for the suspension or revocation of tow truck owner license(s).

(c) The policy or policies must contain an enforcement providing for ten (10) days notice to the City in the event of any material change or cancellation. (Ord. 2547087.)

549.15 Extent of insurance.

(a) The limit in any such insurance policy described in Section 549.14 of such liability of the insured on account of the ownership, maintenance, and use of each tow truck shall not be less than fifty thousand dollars ($50,000.00) for bodily injures to or death of one person, and subject to such limit as to injury of death of one person; one hundred thousand dollars ($100,000.00) on account of any one accident resulting in injuries to or death of more than one person; and twenty-five thousand dollars ($25,000.00) on account of legally liable damage to property in any one accident.

(b) Fire, theft, and explosion liability policy shall be in a minimum amount of ten thousand ($10,000.00). (Ord. 280-72.)

549.16 Identification of tow trucks.

Every person owning and/or operating a tow truck under a license from the City may adopt any trade name, design, color scheme or method of painting or lettering such tow trucks that is approved by the Director of Public Safety. Such approved trade name, design, color scheme or method of painting or lettering shall include the following matter as specified:

(a) The name of the owner or trade name under which the business in conducted shall be painted on each side of the tow truck in lettering at least four (4) inches in height. The business address and telephone number shall also be painted on each side of the tow truck in lettering to be clearly visible. All

required lettering shall be of such color as in the opinion of the Director will contrast distinctly with the color of the body of the tow truck. Whenever the word "paint" or "painted" is used in this chapter, it shall mean the application of coloring matter in oil solution, not water solution, but decals may be used instead of paint.

(b) The owner of the tow truck may have until the second annual inspection to comply with the size requirement for lettering if at the time of the original inspection the tow truck is lettered with a trade name, business address and telephone number. (Ord. 280-72.)

549.17 Transport sheet required.

Tow truck operators shall at all times maintain a current transport sheet containing the following information in the proper sequence on motor vehicles that are moved from one location to another:

(a) Date and time;

(b) Moved vehicle's owner's name and address;

(c) Moved vehicle's serial of license number; serial number required if vehicle is taken anywhere other than the licensee's lot;

(d) Year, make and model of moved motor vehicle;

(e) Location of origin of transport;

(f) Location of destination of transport;

(g) Amount of charges;

(h) Name of person who authorized transport.

Such entries on the transport sheet are to be made at the time of each act and recorded legibly, accurately, and completely as directed in this section. These transport sheets shall be made available for inspection upon the request of any police officer.

This section shall not apply to tow truck operators in responding to calls pursuant to a pre-existing arrangement with the owner of the vehicle to be moved, or his agent, or with an organization providing such service of which the owner of the vehicle to be moved is a member. (Ord. 1677-71.)

549.18 Required records.

The owner of a tow truck shall maintain an accurate and complete file of transport sheets for each driver that is employed including the owner, if he is also an operator. The transport sheet shall be filed by date of occurrence and retained for a period of six months. Upon the request of the Director of Public Safety or his designee, these records shall be immediately available for inspection. (Ord. 1677.71.)

549.19 Notice of conviction.

Repealed by Ordinance 1081-75.

549.20 Authority to issue rules and regulations.

The Director of Public Safety shall promulgate a set of rules and regulations to implement this chapter as he deems proper (Ord. 1677-71.)

549.99 Penalties.

Whoever violates any provision of this chapter shall be guilty of a misdemeanor of the second degree. Any such violation shall constitute a separate offense on each consecutive day continued. (Ord. 1081-75.)

CITY OF COLUMBUS WRECKER RULES AND REGULATIONS

A. Every person, firm, or corporation licensed under Section 549.02 of the Columbus Wrecker-Towing Ordinance will be governed by the following rules and regulations:

1. Every wrecker and wrecker operator must meet the following minimum requirements:

   a. Each wrecker and its equipment will be of sufficient capacity to safely handle any vehicle towed. The manufacturer's rated capacity of vehicles and equipment shall not be exceeded while towing vehicles.

   b. Each wrecker shall be equipped with a power operated winch, winch line and boom having a manufacturer's rated lifting capacity of not less than 5,000 pounds, single line capacity. Wreckers listed as "Heavy Duty" must be equipped with a power operated winch having a manufacturer's rated lifting capacity of not less than 10,000 pounds single line capacity. Wreckers listed as "Extra Heavy Duty" must be equipped with a power operated winch, having a manufacturer's rating lifting capacity of not less than 30,000 pounds.

   c. Wrecker operators must display a high proficiency in the operation of their tools and equipment. Lifting and towing devices shall be designed and used to permit vehicles to be handled without inflicting damage.

2. Each wrecker shall be inspected annually at the time of licensing or within a reasonable time thereafter, except that a licensee who purchases a new or used wrecker shall be granted a thirty day grace period starting on the day of licensing in order to allow time to prepare the wrecker for inspection. A thirty day temporary permit shall be issued at the time of licensing and shall be displayed on the inside of the lower right corner of the wrecker windshield during the thirty day grace period.

   a. Each wrecker shall be made available for inspection at the request of the police division.

3. An annual windshield sticker shall be issued after the wrecker passes final inspection. Said sticker shall be attached to the inside lower right corner of the wrecker windshield. Windshield stickers shall be removed and destroyed if the owner's wrecker license is revoked, or if the wrecker is sold, or after the current licensing period has expired.

B. When a wrecker licensed by the City of Columbus is inspected, it shall be inspected for the following items:

   1. Brakes; capable of meeting the laws of Ohio, and Section 2137.18 City of Columbus Traffic Code.

   2. Mirrors; should have not less than 45 square inches of area, located in usable position for driver and not to impede vision to front or sides.

   3. Fire Extinguisher; should be at least one quart capacity of approved contents.

   4. Flares; at least six, thirty-minutes flares in a protective container of their choice.

   5. Crane; type of make and capacity.

   6. Safety Chains; shall be attached to or available on vehicle to be used in case of cable breaking or hitch coming loose.

   7. Tow Bar; shall be a device that will hold vehicle a firm distance behind wrecker.

   8. Shovel; carried so it can be used for picking up debris at scene or in cases where moving earth may be necessary.

   9. Broom; long handle heavy duty push or standard broom.

10. Wrecking Bars; any sturdy wrecking bar at least 36" in length.

11. Blocks; two scotch blocks, a snatch block, and a 4" x 4" x 36" board used to protect vehicle when picked up.

12. Tie Rope; sufficient length to tie down parts or secure steering wheel.

13. Hand Tools; standard mechanics hand tools, consisting of wrenches, pliers, screw driver, hammer, etc.

14. Stop Lights; at least two sets of stop lights, one at regular height and one sufficiently high to be seen over towed vehicles.

15. Turn Signals; no less than three sets of Class A turn signals, (1) one set consisting of (2) lights in the front, (1) one set of (2) two lights on the highest point of the vehicle, and (1) one set of (2) two lights in the rear; except where there was no provision made by the manufacturer to allow lights to be installed in the rear bumper plate, the rear set of lights shall also be installed on the highest point of the vehicle.

16. Flasher; shall be capable of flashing all turn signals simultaneously; and that all other flashing equipment on wrecker is working properly.

17. Flood Lights; aimed so as to be of the most assistance to operators when working in rear of wrecker at night.

18. Appearance; paint shall be in good condition and body free from extensive damage.

19. Cleanliness; the interior and exterior of the vehicle shall be free of all dirt and grime; the vehicle shall present a well polished appearance.

20. Identification; name, address, and phone number of the owner, or company must be painted on, or permanently affixed to both sides of the wrecker in a manner that is easily readable. The owner's name or company name must be in letters at least 4" high. The address and phone number may be in letters proportionately smaller.

21. Amber Light; a flashing, oscillating, or rotating amber light shall be permanently mounted so as to be easily visible in all directions, even when towing a vehicle.

C. Anyone contemplating additions or changes in wrecker equipment may request assistance from the License Section to assure themselves of meeting minimum requirements.

D. 1. Any wrecker purchased by the Licensee after January 22, 1972, under 8,000 lbs. G.V.W., cannot be issued a Columbus towing license.

2. Any wrecker purchased by the licensee after July 7, 1977, must meet the following specifications in order to be issued a Columbus Tow Truck License:

Light Duty Wrecker:	3/4 Ton Truck minimum G.V.W. 8,000 pounds. Wrecker 5,000 to 6,000 pounds. Minimum cable 3/8". Power winch, or hydraulic lift.

Light Duty Wrecker:	1 Ton Truck. Minimum G.V.W. 10,000 pounds Power winch. Wrecker 8,000 to 10,000 pounds. Minimum cable 3/8".
Light Heavy Duty Wrecker:	1-1/2 Ton Truck. Minimum G.V.W. 15,000 pounds Power winch. Wrecker 12,000 to 20,000 pounds. Minimum cable 3/8".
Medium Heavy Duty Wrecker:	2 Ton Truck. Minimum G.V.W. 20,000 pounds Power winch. Wrecker 24,000 to 32,000 pounds. Minimum cable 7/16".
Heavy Duty Wrecker:	2-1/2 Ton Truck. Minimum G.V.W. 28,000 pounds Power winch. Wrecker 34,000 to 50,000 pounds. Minimum cable 1/2".
Extra Heavy Duty Wrecker:	3 Ton Truck. Minimum G.V.W. 35,000 pounds Power winch. Wrecker 52,000 to 100,000 pounds. Minimum cable 5/8".

WRECKER INSPECTION SHEET

PASSED:_____
REJECTED:_____
REINSPECTED:_____
INSPECTED BY:_____
DATE:_____

COMPANY NAME_____
LIC. PLATE #_____
SERIAL #_____
G.V.W._____

Make Crane:_____Crane Ser.#_____

No. Cables and Cond._____

_____Wheel Lift _____Rollback

_____Headlights
_____Turn Signals
_____Flashers
_____Windshield
_____Wiper/Washer
_____Horn
_____Brake Lights
_____Beacon
_____Flood Lights
_____Emergency Brake
_____Fire Extinguisher
_____Tie Rope
_____Hand Tools
_____Flares (6-30 min.)
_____Broom
_____Shovel

_____Wrecking Bar
_____4"x4"x36" length
_____Snatch Block
_____2 Scotch Blocks
_____Safety Chain(s)
_____Straps (condition)
_____Lettering
_____Tires
_____Mud Flaps
_____Interior
_____Body (condition)
_____Cleanliness
_____Litter Container
_____Mirrors
_____Tow Bar
_____Dollys
_____Sling (condition)